

**KEITH'S  
CONSTITUTIONAL LAW**

# CONSTITUTIONAL LAW

BEING THE

SEVENTH EDITION

OF

RIDGE'S CONSTITUTIONAL LAW OF ENGLAND

*REVISED AND LARGELY RE-WRITTEN*

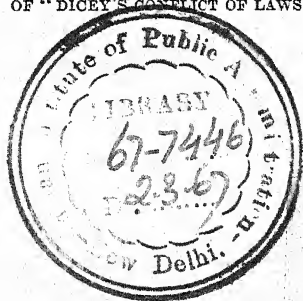
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## PREFACE TO THE SEVENTH EDITION.

I HAVE not thought it desirable in this edition to depart from the principles followed by me in my editions of 1934 and 1937: the treatment of constitutional and administrative law as an inseparable whole, and insistence on the historical development of the constitution as the necessary explanation of its present state. Nor have I found it necessary to alter the views earlier expressed in any essentials, though the book has necessarily been expanded to bring it up to date. The doctrine of the rule of law appears to me not less but rather more important now than in the past. It is true that it is incompatible with the plans of those who recommend the destruction of the capitalistic scheme of society by means of Orders in Council, passed under an Emergency Powers Act and exempted from control by the Courts. But such a plan is revolutionary, and the system which it would create might or might not be superior to the *status quo*, but certainly it would not be in accordance with the principle of democratic liberty which at present, despite various encroachments, can still fairly be predicated of the constitution of the United Kingdom.

On the other hand, the view that the rule of law has been undermined by the extension of the legislative and quasi-judicial authority of executive officers appears to represent possibilities rather than realities. Examination of much recent departmental legislation suggests that in the main it follows just limits. The imposition of penalties by Marketing Boards and similar bodies presents difficulties, and in Scotland the Courts have been decidedly critical of procedure in this regard. But there is considerable force in the arguments of the Departmental Committee, whose Report (Cmd. 5980) was issued in April, in favour of the retention of the power, especially if their recommendation is acted upon, and for each scheme a small disciplinary board of not more than five persons, including an independent chairman with legal qualifications and experience, is appointed by the minister. For the difficult case of the herring industry scheme

district disciplinary tribunals appear inevitable, while the evidence shows satisfactory working of the coal mines scheme.

There are undoubtedly dangers in allowing any department to act as judge in its own case. The decision in the Mayor's and City of London Court in *Wadsworth v. Postmaster-General* (March 1, 1939), that a regulation making conclusive a certified account in any proceedings by or against the Postmaster-General in respect of telephone calls is *intra vires*, renders it possible for grave injustice to be committed. Perhaps the most that can be said is that on the whole it is probable that as a rule serious overcharges are rare. Yet it is not enough that justice in the main be done; it is important that it be felt to be done, and reconsideration of the Postmaster-General's power to give his servants immunity may ultimately be demanded by public opinion.

The valuable literature on Parliament and Council leaves much too controversial for adoption here, but I have stressed certain aspects of the growth of these essential institutions.

Since this book went to press, incidents of great constitutional importance have transpired which must be briefly noted.

The King's visit to Canada, without precedent in the history of the Dominions, was marked by his giving in person assent to Dominion bills on May 19 and his reception of the credentials of the newly appointed Minister from the United States. The success of the King and Queen in evoking demonstrations of loyalty—not least from the French Canadians—and of the sense of imperial unity, fully justified the at first sight hazardous decision that the sovereign should be absent from Europe during a time of European tension. The further decision that in the short visit to the United States the King should be attended by his Canadian Prime Minister was a gracious recognition of the paramount importance of Canadian relations with that State. Constitutionally it must be recognised that the episode must strengthen greatly the authority of the King in the United Kingdom itself.

The decision of the Prime Minister on March 17 to alter vitally his policy of appeasement of Germany, as a result of the establishment by that power of a protectorate over Bohemia and Moravia and over Slovakia, brought the ministry's policy into closer accord with that on which it had obtained a mandate at the election of 1935. Subsequent steps, including the giving of unilateral guarantees to Rumania and Greece and the

conclusion of agreements to resist aggression with Poland and Turkey went far beyond that mandate, which was confined to action under the Covenant of the League, though not actually inconsistent with League principles. It is, however, clear that on the whole the change of policy was in accord with the wishes of the electorate, provided that it was completed by securing agreement with Russia.

This accord, however, was unfortunately less general in the case of the decision intimated on April 26 of introducing a limited measure of compulsory military service, apparently in deference to the demand of France and Poland. As late as March 29 the Prime Minister had disclaimed any intention of resorting to compulsion, in view of the success of voluntary recruiting and the desirability of securing general agreement in the country. Normally, in view of this fact, and of the pledge of Mr. Baldwin in April, 1936, against resort to conscription and that of Mr. Chamberlain on February 17, 1938, the ministry should have sought authority from the electorate for the complete reversal of policy involved, unless it could secure the acceptance of the principle by the opposition parties. Unfortunately it was felt to be impossible to delay a decision until the opposition leaders could be persuaded of the necessity of the new step, and Mr. Attlee condemned the new policy as a breach of faith. He admitted, however, that a general election could not at once be risked in view of the European situation, and contended that a new ministry should have been formed to undertake responsibility for a course of action which the existing ministry had disclaimed the intention of adopting. Constitutionally, of course, the formation of a national ministry, including the leaders of the opposition and those Conservative statesmen who had been sacrificed to the policy of appeasement, would have been eminently desirable. As it was, a grave crisis was averted by the decision of the Liberal party to accept the new policy, and that of the Labour Party, while not accepting it, to refrain from opposing it by industrial action, stressing instead the necessity of securing just treatment for those affected, of negating industrial conscription, and of regarding the action taken as essentially a temporary expedient to meet a crisis.

The Military Training Act, 1939 (2 & 3 Geo. VI. c. 25) imposes on every male British subject ordinarily resident in Great Britain the obligation of being, between the ages of twenty and twenty-one years, registered for military training, becoming then

liable to be called up, within a year from registration, after medical examination, for training in the militia. He is deemed to have been, on the day when he is required to present himself, duly enlisted in the militia under s. 30 of the Territorial and Reserve Forces Act, 1907, for a period of four years, and to have been called out under sub-s. (2) of that section for a continuous period of six months for a special course of training. This may take place in any part of the United Kingdom and in the Channel Islands. On completion of the course the militiaman remains in that force, unless he is allowed to enter in any of H.M.'s reserve or auxiliary forces for an equivalent period. Or he may be allowed at any time to enlist in the Royal Navy or the Regular Air Force.

Provision is made under which, to avoid hardship, the Minister of Labour may allow registration in the military training register to be made before age twenty, or may postpone liability to be called up. This has been done as regards undergraduates and others in like conditions, and those engaged in agriculture, fishing, and anthracite mining. Individuals may apply, and, if the Minister is not prepared to agree with any request, the matter is referred to a Military Training (Hardship) Committee. These Committees, appointed in large numbers, are composed of a chairman appointed by the Minister, and two persons selected by him from a panel including all persons (women were added by an amendment) being members of panels under the Unemployment Insurance Act, 1935 (s. 41). The chairman will normally be a chairman of a court of referees under that section. Appeal may be made by the person affected or the Minister to the umpire, or a deputy umpire under that Act, sitting with two assessors, whose decision is final.

For conscientious objectors ample provision is made (s. 3) with due regard to the nature of their consciences. Application may be made for registration in the register of conscientious objectors, and is given provisionally. The issue is finally determined by local tribunals, or, on appeal which is open to the minister also, by an appellate tribunal. Local tribunals are presided over by a County Court judge in England, a sheriff or sheriff substitute in Scotland; there are four members, chosen like the chairman by the minister, who are to be impartial persons, and one shall be appointed after consultation with organisations representative of workers. The appellate tribunal shall have two divisions, one for England, the chairman nominated

by the Lord Chancellor, one for Scotland, the chairman nominated by the Lord President of the Court of Session. Two members will be selected for each by the minister under like conditions to those affecting the local tribunals. The tribunal, whether local or appellate, if satisfied that the ground on which application is made is established shall direct either that the applicant shall, without conditions, be finally registered in the register of conscientious objectors, or that he shall be conditionally registered for a year, and finally registered if he complies with that condition, or that he shall be registered in the military training register as liable to be employed only in non-combatant duties. If not satisfied, the tribunal shall order unqualified registration in the military training register. In the case of conditional registration in the register of conscientious objectors, the person affected must undergo a period of six months' continuous training, provided or approved by the minister, in work of a civil character and under civilian control, receiving like remuneration to a military trainee. But the tribunal may allot other work of similar character, if it holds that such employment under direction of the minister would be detrimental to the public interest. There is further provision by s. 14 to meet the case of a person whose claim to be a conscientious objector has been rejected, or who did not make any such claim, and who has been sentenced by a court-martial to imprisonment for three months or over in respect of an offence while in training. He may apply to the appellate tribunal who, whether it holds that his offence was committed by reason of a conscientious objection or not, may recommend his immediate discharge from the reserve after he has served his sentence. If it does not believe that the offence was committed on grounds of conscience, it may order that, after discharge, the person concerned shall undertake civil work for a period up to six months; on failure to comply with such an order, on summary conviction the person affected may be imprisoned for a period not exceeding two years. If recommendation for discharge is made the Secretary of State must give it effect. It will be seen that this section precludes the possibility of repeated court-martial sentences, such as aroused public disapproval during the war of 1914—18. It will be noted that the Act adopts the principle that a person, who has a conscientious objection to military service absolutely, is entitled to refuse service without making any contribution in lieu to the state. Any suggestion of

refusing the franchise or governmental employment to such persons was negatived, a doctrine with difficult ethical assumptions, and one which places on parents every inducement to train youth in pacifist doctrines. No doubt the principles laid down rendered easier the passage of the bill, but it will be difficult to undo the effect of a declaration that the state has no moral claim on all its citizens to defend it.

Another serious constitutional issue was involved regarding the position of Dominion nationals resident in Great Britain. Mr. de Valera protested against any Irish national being compelled to serve, and contended, it seems, that it was improper for Britain to claim as British subjects any Irish nationals. Alternatively, he seems to have held that, assuming that such nationals could be deemed to have double nationality, then they fell under Art. 2 of the International Protocol of 1930 relating to Military Obligations in certain cases of Double Nationality, under which "if a person possesses the nationality of two or more States and, under the law of any one of such States, has the right, on attaining his majority, to renounce or decline the nationality of that State, he shall be exempt from military service in such State during his minority." The answer to these contentions was clear. The right of Britain to claim Irish nationals as British subjects is clear under international and municipal law alike, for Eire has been duly accepted by Britain and the Dominions as part of the British Commonwealth, and the King still acts in certain external matters for Eire. Moreover, Britain has consistently denied, with the homologation of the Imperial Conference of 1926, that the relations of Britain and any Dominion are governed by international law. But, even were they so governed, Art. 2 of the Protocol would afford no help to Eire, for British law has no provision allowing a British subject to renounce British nationality at age twenty-one, because he is also an Irish national.

The wishes of Mr. de Valera, however, were given effect in part, for the bill was amended so as to restrict conscription to British subjects ordinarily resident in Great Britain, and nationals of the dominions, or persons born or domiciled in any part of the dominions, or in protectorates, or mandated territories, or territories under protection or suzerainty shall be deemed to be ordinarily resident therein, if resident in Great Britain for less than two years, or residing only for educational purposes, or otherwise for a temporary purpose only (s. 17). Persons residing in

Great Britain but only by reason of employment under the government of some part of the Empire are also exempt. The "two years" concession is without logical ground, but presumably was adopted so as to concede in practice most if not all of Mr. de Valera's demands. The exclusion of Northern Ireland was made in deference to his insistence. The step has, of course, the result of rendering it completely anomalous that the British taxpayer should provide Northern Ireland with large grants in order to enable it to enjoy privileges similar to those of the United Kingdom in regard to social services, and of strengthening Mr. de Valera's demand for the incorporation of the territory in Eire. There are grave moral objections to creating a favoured class of British subjects at the expense of the people of Great Britain, and it is anomalous that British forces should be stationed in Northern Ireland, when it is deemed improper to impose on the people thereof an obligation imposed on those of Great Britain. At least it might have been expected that Northern Ireland would be asked to pay now her proper contribution to imperial defence. It is no less objectionable that the Channel Islands should remain exempt; there is no constitutional justification for a system which relieves the islands of the elementary obligation of defending themselves. In the case of the Isle of Man provision exists (s. 20) for the application of the Act by Order in Council. Power is also taken (s. 18) to apply the Act to British subjects ordinarily resident outside Great Britain, but this power cannot be exercised in respect of nationals of any part of H.M.'s dominions outside Great Britain, or of any one "who is a person belonging to any such part of H.M.'s dominions, or to a British protectorate, a mandated territory, or any other country or territory being a country or territory under H.M.'s protection or suzerainty." The vague term "belonging" is presumably wider than "born or domiciled" in s. 17 above referred to, but in both clauses the mention of "British protectorate" is unnecessary in view of the mention of "country or territory under H.M.'s protection." Territories under suzerainty are presumably included to cover the Indian States, though these would also be covered as under protection. The clause seems unworkable.

By an important innovation provision is made (s. 7) to require the employer of any trainee to reinstate him under conditions not less favourable than if he had not been called up, subject to a fine up to £50; in addition he may be called upon to pay

to any person not duly reinstated up to twelve weeks' remuneration at the rate last payable; certain excuses are allowed for non-reinstatement. Regulations may be made to impose like penalties if employers terminate the employment of men to avoid their falling under the reinstatement provisions.

The procedure in taking land required under Defence Acts is simplified (s. 8), and compensation is to be awarded as under the Acquisition of Land (Assessment of Compensation) Act, 1919.

In order to give those affected by the Act the opportunity of naval service, the Act (s. 9) allows the Admiralty to establish a royal naval special reserve, to which the provisions of the Royal Naval Reserve (Volunteer) Act, 1859 shall apply, save that the term of service shall be four, not five, years, a special reservist shall undergo a course of continuous training for six months, and, when entered for marine service, a reservist, when called into actual service and when being trained or exercised, shall be subject to the law for the government of the royal marine forces.

Consequential matters may be provided for by Order in Council, first approved by resolutions of both houses; in emergency when Parliament is prorogued or dissolved or both Houses are adjourned for more than fourteen days, an Order may be made, but it ceases to have effect after twenty-eight days from the first sitting of the Commons after the making of the Order unless confirmed by resolutions of both Houses. Regulations on procedure made by the Minister of Labour are valid, unless annulled by resolution of either House within forty days. Both Orders and regulations are exempted from publication under the Rules Publication Act, 1893 (s. 1).

The Act itself has a duration of three years, subject to earlier termination, if its necessity has ceased, by Order in Council, but it may be continued for a year at a time by Order in Council authorised by both Houses.

The Military Training Act is intended to supply a permanent force for the partial manning of the air defence of Great Britain; to assist in the mobilisation of the regular army; to improve the efficiency and secure the strength of the Territorial Army; and to provide immediate trained reserves. It is supplemented by the Reserve and Auxiliary Forces Act, 1939 (2 & 3 Geo. VI. c. 24), which permits the King in Council to authorise the Admiralty and the Secretaries of State to call out for service all or any of the reserve and auxiliary forces, if satisfied that their services

are urgently required for ensuring preparedness for the defence of the realm against any external danger. The provisions of the Reserve Forces Act, 1882 (s. 13), and of the Territorial and Reserve Forces Act, 1907 (s. 17), which require the summoning of Parliament do not apply, the object being to have a procedure of a simple kind not involving the formality of a proclamation of a state of imminent national danger or great emergency. The Act contains like provisions to the Military Training Act as regards the duty of employers to reinstate and the taking of land, and also the making of Orders in Council on consequential matters.

Not less important is the decision, taken before conscription was determined upon, to add largely to the strength of the Territorial Army, in consequence of the decision that the needs of the situation demanded that Britain should be prepared to send an expeditionary force overseas. Originally the force contemplated was six regular and thirteen territorial divisions, but the latter figure is to be doubled, and for that purpose the Territorial Field Army is to be increased up to about 340,000 in strength, additional to the forces assigned to anti-aircraft and coast defence, seven divisions. The popularity of the Territorial Army proved such that the Labour opposition to conscription was largely based on the success of the voluntary system thus shown. It may be added that the cost of conscription is high, £30,000,000 for works and equipment, £10,500,000 for personnel in the first year, £26,500,000 in 1941, for in addition to pay allowances for dependants and to meet cases of hardship are necessary. A special concession excuses trainees from any obligation, as is normal, to aid the civil power in case of industrial strife, but no provision to this effect is included in the Act.

The new army plans have involved the revival in a new form of the Inspectors-General of the Oversea and the Home Forces. The former officer will exercise the command-in-chief in war.

It is remarkable that the by-elections immediately following the governmental decision saw the most curious apathy, only 37 per cent. of the electors voting at three elections whose results were reported on May 18, one seat passing to Labour; the Kennington result on May 24 converted a Conservative majority of 545 to a minority of 3,596 on a poll of 42 per cent. of the electorate, due partly to dissatisfaction in the public mind at the delay in securing an accord with Russia, in face of the formal military alliance of Germany and Italy of May 22.

The procedure followed in recent years, under which, on adjournment for a fixed period, the Lord Chancellor and the Speaker are authorised after consultation with the government to recall the Houses, was operated on April 13, when the Prime Minister announced, as a result of the violation of the Anglo-Italian treaty of 1938 by the annexation of Albania, the decision of the ministry to give a guarantee to Greece. The treaty, however, was not denounced by Mr. Chamberlain, but Italy accepted the accrediting of the new Ambassador to the King of Italy, Emperor of Ethiopia, without mention of Albania. But recognition will no doubt be accorded in due course, as it was to Spain on February 26, 1939. The Prime Minister has authorised *de facto* recognition of Slovakia as a German Protectorate, and a like recognition as to Bohemia and Moravia was foreshadowed, despite protests by Mr. Attlee and Mr. Alexander on May 24 and 26, and accorded in June.

The Budget for 1939—40 made provision for expenditure of £247,738,000, including £8,691,000 for civil defence, for the defence preparations, to be augmented by some £380,000,000 from loan under the Defence Loan Acts, 1937 and 1939. Civil supply services were put at £432,860,000, tax collection £14,646,000, and consolidated fund services £247,200,000, a total of £942,444,000; self-balancing expenditure on the Post Office and broadcasting totalled £83,399,000. Additional revenue was secured by increasing sur-tax, estate duties on estates over £50,000 value, duties on sugar, tobacco, photographic plates and film, and motor vehicles, giving in a full year £33,945,000. The National Defence Contribution, which presses unfairly on holders of ordinary shares, was maintained at 5 per cent. for bodies corporate, 4 per cent. for persons, on the profits of businesses carried on in the United Kingdom or by bodies or persons ordinarily there resident; a yield of £25,000,000 is expected. On the other hand the Post Office can no longer find the £10,750,000 due, and a new arrangement is necessary. An armament "profits tax" was added to discourage profiteering in armament production which has become widely prevalent, as was conceded by Mr. Chamberlain on April 26, but the Labour suggestion of an emergency tax on capital was rejected.

Defence needs have resulted in Mr. Morrison being given as Chancellor of the Duchy of Lancaster the duty of answering in the Commons for Lord Chatfield, Minister for the Co-ordination of Defence. He is also a member of the Imperial Defence

Committee, and takes over from Lord Chatfield the chairmanship of the Principal Supply Officers' Committee, and from the President of the Board of Trade charge of the Food Defence Plans Department.

The Lord Privy Seal, who had acted in matters of civil defence under authority delegated by the Home Secretary, was given a definite status by the Civil Defence Act, 1939, which (*inter alia*) provides for the evacuation of children and women from dangerous areas in war time, authorises compulsory billeting, and places obligations on employers in certain cases for the protection of their employees against air raids.

The demand for a Ministry of Supply was met in part by the appointment, notified on April 20, of Mr. L. Burgin to be minister without portfolio, pending the passing of a Ministry of Supply Act. His duties, however, were to be limited to supplies for the army, certain stores of general user, and the maintenance of reserves of essential metals and raw materials. Power will be available, if necessary, to secure priority for government orders, to requisition output, to commandeer storage, to fix prices, and to require protection of essential plant.

The Report (H.C. 101, 1939) from the Select Committee on the Official Secrets Acts is important by reason of the stress which it lays on the doctrine of the Commons in 1621 that the privilege of freedom of speech of members is in truth the privilege of their constituents, secured to members to enable them to discharge the functions of their office without fear of prosecutions civil or criminal; "freedom of debate being once foreclosed, the essence of the liberty of Parliament is withal dissolved," as the Commons stated in 1610 in their petition to James I. regarding impositions. The Committee held that privilege must be deemed to include immunity from prosecutions under the Acts for revelations made in the Commons, rejecting the contrary view based on the dictum (p. 73, *post*) of Stephen, J., in *Bradlaugh v. Gossett*. It was admitted that privilege did not allow a member to solicit a person holding office under the Crown to disclose information which he was not authorised to disclose, or to receive information knowing that it was communicated in contravention of the Acts, though it would be difficult to prove the case against the member if his words in Parliament had to be relied upon, as the House could refuse to allow evidence to be given. But it was admitted that such information was often received. In some cases such communication would be legal under the provision in the Acts

which allows communication to an unauthorised person, provided it is the duty in the interest of the state of the person who communicates such information to do so. In other cases, where information was obtained, members had made proper use of it in the interest of the state, and strict enforcement of the Acts might prevent their doing so. The House might hold that action impeding members in obtaining necessary information was a contempt. As against abuse of the Acts, safeguards existed in the fact that the initiation of a prosecution must be authorised by the head of a department which would be represented in the Commons; that the Attorney-General must sanction proceedings with due regard to the special position and duties of members; and that, if the Commons were in session, a member threatened with prosecution could bring the matter before the House as a matter of privilege. The net result seems to be that members should exercise discretion in seeking information and framing questions in matters affecting the safety of the realm, and the government must be careful not to use the powers of the Acts to impede members in performance of their duties. No formal definition of privilege was deemed wise, but the House was asked to approve the conclusions of the report, and the Prime Minister agreed to move accordingly. The difficulty of the power to interrogate (p. 70, *post*) was recognised, but felt to be unimportant, since the Official Secrets Bill passed in the Lords reduced the power of s. 6 of the Act of 1920 to cases of espionage, so that no threat to Mr. Sandys could have been made, had the new rule then been in force. It must be added that freedom of action by members is the more desirable, since official communications to influence the Press are frequent, and that of March 9 asserting that foreign politics were in a more promising condition showed either that the ministry was badly served by the diplomatic service or that it disregarded its information. It is not, of course, now open to serious doubt that, for instance, Mr. Churchill's information on comparative figures of airship strength has been more accurate than that sponsored by the government.

At the same time the Select Committee stressed the power of the House to discipline, *e.g.*, by expulsion, members who abused their privileges. Indeed, in certain cases the limits imposed by the practice of the House are rather too rigid, as when the deputy Speaker took exception in the debate (May 10) on the Military Training Bill to Mr. Pritt's perfectly natural

contention that benches of magistrates, in many cases employers of labour, were not the most suitable tribunal to which to entrust the function of deciding claims of employees that they had been unjustly refused reinstatement. The danger of bias in justices was almost at the same time recognised in the sanction given by a large majority to the introduction of a Licensing (Declaration by Justices) Bill, which was based on the suggestion that refusal at London Quarter Sessions, to confirm a licence granted by the Court below had been motivated by interest.

The danger of suppression of information by the ministry is illustrated by the discussion in the Commons on April 6 of a belated effort by the Prime Minister, through the issue of a "D" notice to the Press, to prevent the publication of an indiscreet utterance of the First Lord of the Admiralty in the "Ark Royal," which in fact had already been broadcast to the Empire. It was made clear that there was growing up a tendency by use of this notice, which was regarded as a warning that the Official Secrets Act might be invoked if it were disobeyed, to suppress information to which the public was entitled. The explanation given was that the request was made by Mr. Chamberlain on the spur of the moment and that he had not intended that the particular form should be used.

A serious limitation of the value of discussions in Parliament as a means of guiding the nation was discussed in the Commons on May 25 when protests were made against the fact that eight hours out of eleven in the Palestine debates of May 22 and 23 were taken up by official party speakers and Privy Councillors, with average speeches of forty minutes, so that private members had hardly any opportunity for speaking. The Speaker repeated earlier and very strong appeals to all speakers to limit carefully the length of their allocutions, and thus to enable the Commons to function more effectively. He stressed the fact that under guillotine procedure the need for brevity was more than ever incumbent. In the Dominion Parliaments the solution of a definite time limit has more or less effectively met the case.

It must, however, be noted that party discipline in the Labour party is more and more inclined to forbid any expression of divergent opinion on issues decided by the party, all members being expected to vote as decided by the Parliamentary party. In accord with this the expulsion of Sir S. Cripps and others was approved by a very large majority at the Labour Party Conference on May 29, thus raising a very difficult question as to the possi-

bility of members working within the party to modify its present policy of totalitarian Socialism, the acceptance of which by the majority of the electorate is regarded as improbable at any early date by a number of Labour supporters.

The crisis of March produced a certain measure of clarification of views in the Dominions regarding their relation to the United Kingdom in the event of war. Canada stands for the right to decide what part to play according to the decision of Parliament, but does not assert the legal possibility of neutrality, as was stressed in the Commons on March 30 and 31. The Union, as represented by General Hertzog and now also by General Smuts, whose views have altered, claims the right of neutrality on the decision of Parliament: General Smuts holding that in fact it would not be adopted, General Hertzog declining to commit himself in any way; the Nationalist party stands for rigid neutrality. Mr. de Valera claims absolute neutrality, but has warned Britain that, unless Northern Ireland is surrendered, there must be difficulties, such as are indicated in the plans of the Irish Republican Army to destroy British communications as a means of coercion to surrender that territory. The Australian Government's policy is one of co-operation with Britain but with increasing autonomy: Mr. Menzies, successor of Mr. Lyons as Premier, has indicated the intention to establish diplomatic contacts direct with the United States, Japan, and China in the first place. He has negatived compulsion for oversea service, though in favour of it for local defence: the Labour party stands for neutrality and no compulsion even for local defence, the former Labour policy on this head having been definitely repudiated. Considerable increases of defence preparation and expenditure are envisaged in all the Dominions, plans in Australia and New Zealand having been affected by a conference at Wellington with British representatives. Malaya has given generous grants for the naval base at Singapore.

The accidental death of the King of Iraq leaves the state under a minor, and adds to the danger of instability. In Trans-jordan progress has been satisfactory, and further relaxation of British control over the administration has been conceded. For Palestine a new régime was approved by both Houses of Parliament on May 23. The government accepts the validity of its obligation to secure self government as well as that of providing a National Home: it negatives any idea of creating a Jewish State by promoting immigration to give the Jews a

majority; it limits immigration for the next five years to 10,000 a year with an additional 25,000 refugees, thus bringing the Jewish population up to a third. Thereafter, immigration must depend on Arab assent. It is proposed to consider after five years a constitution which will safeguard Jewish rights and the National Home, while creating an independent state to become operative within ten years. Meantime Arabs and Jews will be placed at the heads of departments with British advisers, but the High Commissioner will retain complete control of policy as at present; later a legislature may be called. The plan evoked bitter hostility from the Labour and Liberal oppositions, two Cabinet Ministers failed to vote, and no fewer than twenty-one Unionists voted against the ministry. It is, however, clearly an honest effort to do justice to both Jews and Arabs, and it recognises that to force Jewish domination over the Arabs would be a grave crime. Though rejected by the Jewish Agency and other organisations, and disapproved by the Arab States and some of the Arabs of Palestine, the scheme, which does not rule out an ultimate federation, represents a possible solution of the *impasse* created by the fact that Mr. Lloyd George's government gave pledges to Jews and Arabs which cannot be reconciled, and which must therefore be fulfilled in part only. The threat of Jewish spokesmen to use the economic power of the Jews to defeat the governmental policy is a singularly unfortunate return for the sympathy shown to Jewish interests in Europe by the United Kingdom, and for the prolonged sacrifice of British obligations to the Arabs in favour of the Jews. Illegal immigration of Jews unhappily is taking place on a scale menacing the future of the Arabs.

The relations of India with the Union of South Africa have again entered upon a critical state by the decision of the Union Government to insist on racial segregation as against Indians, thus departing from the settlement of 1914, and re-opening in a very difficult way the problem of the status of India in the Commonwealth. Both Mr. J. H. Hofmeyr and Mr. L. Blackwell persisted in opposing the legislation of the ministry, at the cost of censure by the United Party caucus. It is, of course, one aspect of the now fixed Union policy of effecting a complete separation of European and every class of non-European, which the Nationalist party desires to supplement by prohibition of Jewish immigration and expulsion of Jews recently admitted. The decision of the British Government to reserve the highlands

of Kenya for Europeans is unfortunately an example of a colour bar of a type inconsistent with any real respect for the position of India in the Commonwealth. In India, federation remains in suspense; some minor changes of detail are included in the India and Burma (Miscellaneous Amendments) Bill.

In the preparation of the Fifth Edition (1934) I had valuable assistance from my late wife, and in this, which, at the suggestion of the Publishers, appears under a new style, I owe aid to my sister, Mrs. N. B. DEWAR.

A. BERRIEDALE KEITH.

UNIVERSITY OF EDINBURGH,

*June, 1939.*

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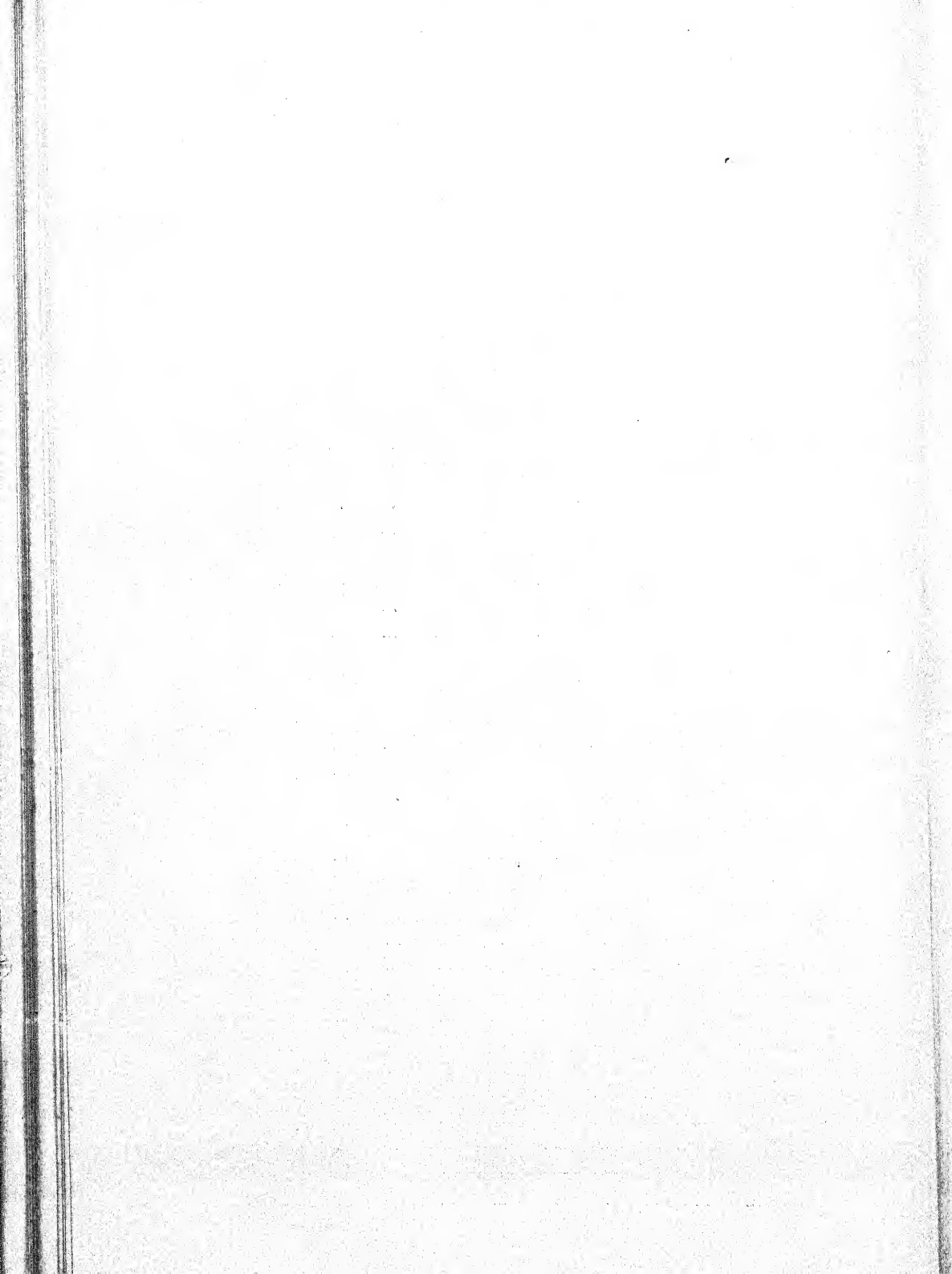
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# CONSTITUTIONAL LAW.

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## PART I.

### The Nature and Sources of English Constitutional Law.

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#### CHAPTER I.

##### THE SOURCES OF ENGLISH CONSTITUTIONAL LAW.

**The Scope of Constitutional Law.**—It lies with jurisprudence to define the scope of constitutional law. For practical purposes it suffices to note that the modern State presents certain essential features of organisation. [The functions of the State go far beyond mere preservation of internal order and of external independence; it is expected to promote social and economic ends of every kind, and these are conveniently classed as executive functions.] It is necessary also to alter from time to time the existing law, and this is a distinct function, the legislative. [Interpretation of the law and its application to concrete cases adduced, make up the judicial function.] It is the part of constitutional law to examine the organs by which these functions are carried out, their inter-relations, and the position of the members of the community in relation to these organs and the functions of the State, or more technically it may be said (a) “to include all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the State.” It is logically impossible to distinguish administrative from constitutional law, and all attempts to do so are artificial; [administrative law, if treated separately, is merely that aspect of constitutional law which deals in detail with the powers and functions of the executive authorities, including local government officials. It covers therefore such issues as the legislative and judicial powers of the executive, proceedings by the Crown and against it and public departments, the methods and limits of judicial control of executive authorities, central and local, &c.] But in this work these issues find treatment in relation to other constitutional aspects. Of the various aspects those affecting the central government are of fundamental importance. Cabinet and Parliament control foreign policy, thus vitally affecting the life and security of the subject; they govern finance, and agriculture and

(a) A. V. Dicey, *Law of the Constitution* (8th ed.), p. 22. Cf. Maitland, *Const. Hist.*, pp. 526—539.

trade depend on their decisions; from them proceeds the driving power for social reform. The judiciary asserts the rule of law and serves to preserve the rights of the people. To these topics, therefore, the main portion of this work is devoted. The details of administrative law and local government law are of wholly subordinate importance, except to those engaged in their administration.

**The Sources of Constitutional Law.**—[It is the fundamental characteristic of the English Constitution that it has evolved continuously without any such revolutionary changes as to necessitate its re-statement in a single instrument establishing a constitution. Despite accession of territory England has remained a unitary kingdom, France has never lost her unity, but has passed from monarchy to republic, from republic to Empire, then to monarchy in varied forms, to republic again, to Empire, and finally has a republican regime. Germany has passed from disunion to confederation, to Imperial federation, and has discarded the republic quasi-federal constitution of Weimar for unification under an autocrat invested by popular vote with unfettered dictatorial powers. The States of America had to pass from monarchy to republicanism, often combined with federation. Switzerland has reformed her federal system, and the war of 1914 called into being a large number of new states or states virtually reconstructed, all of which—Czechoslovakia, under overwhelming pressure—have now departed widely from democratic ideals. It is significant that, when monarchy disappeared for a time, Cromwell fully recognised the need for a formal constitution (b). This historical continuity renders the sources of constitutional law complex, but there is no justification for A. de Tocqueville's pessimistic assertion, *Elle n'existe point*.

[The constitutional law must be distinguished from the customs of the constitution; in England the criterion of the possibility of appeal to the courts of law is often available, but not always, for in some cases it is clear that no court could afford a remedy (c).]

### *Laws Proper.*

The sources of constitutional law are (1) common law, and (2) statute law.

**Common Law.**—The common law may be regarded as the mass of customs accepted by the people as governing their relations *inter se*, so far as they will be enforced by the law courts. Thus it is true in a sense that the validity of statute law depends on common law, for it is by that law that the only form of legislation admitted is by Act of Parliament. The whole of the prerogative of the Crown (d) depends on the common law, and on it rest the fundamental rights of the subject. By it the decisions of the judges are adopted. In a

(b) Instrument of Government, December 16, 1653; E. Jenks, *The Constitutional Experiments of the Commonwealth*; Marriott, *Crisis of English Liberty*, pp. 251 ff., 310 ff.

(c) Cf. *Civilian War Claimants' Association v. R.*, [1932] A. C. 14.

(d) *Anon.* (c. 1547), 73 E. R. 913.

sense the judges in declaring the law are legislators; by their decisions they have established the rule that counter-signature of royal orders is necessary (e), that the Minister is responsible for royal acts (f), that judges are immune from suit (g), and that juries are independent (h).

**Statute Law.**—There are various forms of statutory enactment:—

- (1) **Statutes and Statutory Regulations.** These affect a variety of subjects, such as the qualification of electors and of members of Parliament, the distribution of seats, the manner in which elections are to be held, and the relations of the two Houses. Many of the executive functions of the Crown are exercised by virtue of statutory authority, e.g., the administration of the Coinage, the Foreign Jurisdiction, or the Extradition Acts. The succession to the Crown itself is now governed by the Act of Settlement, 1701, and His Majesty's Declaration of Abdication Act, 1936; the Regency by the Regency Act, 1937; in fact, there is no branch of constitutional law which is not affected by statute.
- (2) **Quasi-Statutes.** These are legislative enactments marking solemn compacts made between the Crown and Parliament defining constitutional principles, similar to the general declarations of popular liberties which are usually found in the written constitutions of foreign nations, and marking the results of the great national and constitutional crises in English history. The principal of these great constitutional landmarks are *Magna Carta*, 1215 (i); the *Petition of Right*, 1628 (k); the *Bill of Rights*, 1689 (l); and the *Act of Settlement*, 1701 (m).
- (3) **Treaties or Quasi-Treaties;** e.g., the *Acts of Union with Scotland and Ireland* in 1707 and 1800; the *Irish Free State (Agreement) Act*, 1922, giving effect to the *Irish Treaty* of 1921; and the *Statute of Westminster*, 1931, deciding the issues of the relations between the United Kingdom and the Dominions.

**Lex et consuetudo Parliamenti.**—It is sometimes suggested that a third source should be recognised in the law and custom of Parliament. It does not, however, appear to be worth while making this distinction. The common law recognises the special rights of the Crown which

(e) *Vernon v. Benson* (1723), 9 Mod. Rep. 47: a sign manual not countersigned by the Lords Commissioners of the Treasury or a Secretary of State is not enough.

(f) *Danby's Case* (1679), 11 St. Tr. 599.

(g) *Hamond v. Howell* (1678), 2 Mod. Rep. 219.

(h) *Bushell's Case* (1670), 6 St. Tr. 999.

(i) See Stubbs, *Select Charters*, p. 291. It has a predecessor in Henry I.'s Charter of 1100 (P. H. E., ii, 118—119).

(k) 3 Car. I. c. 1.

(l) 1 Will. & Mar. sess. 2, c. 2. It seems convenient to give the actual dates as opposed to the conventional dates; up to 1793 Acts dated back to the beginning of the session.

(m) 12 & 13 Will. III. c. 2. For a short account of these important documents see *post*, pp. 8—12.

constitute the prerogative; it equally takes cognisance of the special privileges of the Houses of Parliament, and it admits within limits the right of the Houses to determine what these privileges are. But the courts will not give effect to claims of either House in excess of what they deem the privilege appertaining thereto (*n*), so that it seems undesirable to regard the law and custom of Parliament as a third source of law (*o*).

### *Constitutional Conventions.*

[Under Conventions or Understandings fall many of the rules which govern the relations existing between the component parts of the sovereign power itself, the mode of exercise of the prerogative of the Crown, and the procedure of Parliament. Their nature and importance may best be illustrated by examples of some of the principal conventions generally recognised and acted upon by politicians (*p*).]

The existence of these conventions is at times recognised in Imperial and Dominion legislation; thus the existence of the offices of Prime Minister and leader of the opposition to His Majesty's government and of the Cabinet is recognised in the Ministers of the Crown Act, 1937, and in the Union of South Africa, the Status of the Union Act, 1934, alludes to the constitutional conventions relating to the exercise of the functions of the Governor-General in regard to the appointment of ministers and the dissolution of Parliament (*q*). Occasionally Dominion (*r*) courts have been called upon to recognise their existence, and the Privy Council in the Irish Boundary Question (*s*) ruled that the "government of Northern Ireland" must mean the Governor acting as advised by his ministers. But English courts have, no doubt, wisely, not been invited to endeavour to deal with issues which are too essentially political to be suitable for judicial decisions, nor is it desirable that attempts at Parliamentary definition should be made (*t*).

### **Examples of Conventions.—**

- (1) Parliament must be convoked at least once a year.
- (2) A Ministry which has lost the confidence of the House of

(*n*) *Stockdale v. Hansard* (1839), 9 A. & E. 1, 203, *per* Patteson, J.

(*o*) May, *Parl. Pract.* (13th ed.), pp. 72 f.; 1 Bl. Comm. 163.

(*p*) The whole system of responsible government in the Dominions and of inter-imperial relations grew up upon Convention, but this will be fully discussed later (see *post*, Part IX., Chap. II.). All constitutions depend largely on conventions, even that of the United States, where convention has limited presidential tenure to eight years and deprived the presidential electors of any freedom of choice; see H. W. Horwill, *The Usages of the American Constitution* (1925). In the United States under President F. Roosevelt, there has been seen how conventions can be modified to meet emergent conditions, as in the United Kingdom.

(*q*) Act No. 69, s. 4 (3).

(*r*) *Ryder v. Foley* (1906), 4 Commonwealth L. R. 422 (meaning of Government as appropriate minister); *British Coal Corp'n. v. The King*, [1935] A. C. 500 (Judicial Committee is really a Court of law, though its action is in form advisory); *Commercial Cable Co. v. Govt. of Newfoundland*, [1916] 2 A. C. 610.

(*s*) *Parl. Pap. Cmd. 2214* (1924), p. 3.

(*t*) Keith, *Letters on Imperial and International Problems*, 1935—36, pp. 81—90. The Constitution of the Irish Free State, and now that of Eire, have carried far the efforts to turn conventions into formal law.

Commons must retire from office, unless it advises and is granted a dissolution.

- (3) The Crown is normally bound to grant a dissolution on the request of a ministry which has not recently received a dissolution.
- (4) If on a dissolution the electorate does not pronounce in favour of the ministry, it should retire from office if it appears that an opposition party has a clear majority; otherwise it can properly await an adverse vote in the House of Commons. But it cannot ask for, nor should the Crown grant, a second dissolution.
- (5) After an extension of the franchise, an appeal to the electorate should be delayed if possible until the new register is compiled.
- (6) The House of Lords does not originate money bills, and it must ultimately give way to the House of Commons in matters of legislation (u).
- (7) The Crown should assent to any bill passed by the two Houses of Parliament, or by the House of Commons under the Parliament Act, 1911.
- (8) The Cabinet are collectively responsible to Parliament for the conduct of the executive, for appointments made by the Crown on the advice of the Cabinet, and for the legislation proposed.
- (9) The party who command the majority in the House of Commons are entitled to have their leader placed in office as Premier with the right to select his colleagues.
- (10) The foreign policy of the country ought to be conducted according to the wishes of Parliament. Declaration of war or neutrality or the making of peace against the will of the House of Commons is unconstitutional.
- (11) In case of sudden emergency (e.g., insurrection or invasion) if the Ministry require additional authority, they should convene Parliament, but they must as a paramount duty preserve order, relying on Parliament to indemnify any illegal acts.
- (12) The House of Commons deals with money bills only on the initiative of the Crown represented by the ministry; it considers them in Committees of Ways and Means and Supply; all bills must be read three times before they are passed; private bills must be subjected to special procedure (x).
- (13) Lay peers do not take part in legal proceedings before the House of Lords.

(u) These principles are recognised and in part made law in the Parliament Act, 1911. See p. 104, *post*.

(x) Irregularity cannot be held a legal ground of invalidity: *Edinburgh and Dalkeith Ry. Co. v. Wauchope* (1842), 8 Cl. & F. p. 723. This is specifically enacted for Indian legislatures by the Government of India Act, 1935 (26 Geo. V. & Edw. VIII. c. 2), ss. 41, 87; Government of Burma Act, 1935 (26 Geo. V. & 1 Edw. VIII. c. 3), s. 32. For the Dominions, see Keith, *The Dominions as Sovereign States*, p. 169.

**Nature of Conventions.**—The most important of these conventions serve the purpose of solving the long struggle between Crown and people and this takes the form of ensuring that the discretionary authority of the Crown shall be exercised in accordance with the wishes of the House of Commons, as the predominant power in the State, and therefore in accordance ultimately with the wishes of the electorate.

This ultimate power of the electorate is not recognised by the courts, which acknowledge the sovereignty of Parliament alone, and the electorate must express its wishes through Parliament in the shape of legislation before the courts will take notice of them. But none the less is it a power which dominates the Constitution, and the only intelligible criterion nowadays of the constitutionality as opposed to the legality of any action is its conformity to the considered judgment of the electorate. A crucial instance is afforded by the cases where the Crown has acted in opposition to the wishes of the House of Commons in dismissing a Ministry which possessed the confidence of the House. In 1783 and 1807 George III. dismissed Ministers who still possessed the confidence of the House, and in both cases the electorate confirmed this course by returning a majority pledged to support the Crown's nominee. In 1834, on the other hand, when William IV. called Peel to office against the wishes of the House, upon a dissolution the electorate refused to confirm the Crown's action. In 1931 criticism of the King's action in approving the Premier's secession from his party to form a coalition and in granting a dissolution as unconstitutional was met by reference to the expressed will of the electorate (y). This ultimate predominance of the wishes of the electorate is expressed by saying that, while Parliament alone is the *legal sovereign*, the electorate is the *political sovereign*.

Nor does it seem worth while to distinguish conventions from practices on the ground that they are acts performed because those who perform them believe that they ought to thus act. To decide on what motives men act is seldom possible, nor indeed do they often themselves know their real motives or state them accurately. Moreover, the mere fact that a thing has often been done tends by the psychological law of imitation to produce like action without conscious motivation.

(Conventions, from their nature, are essentially fluid. That a peer cannot be Prime Minister dates only from 1923 when Lord Curzon was passed over in favour of Mr. Baldwin. The old conventions of the House of Lords' powers as to money bills were violated from 1909 and had to be hardened into law.) The power of the Crown to dismiss a ministry, or to reject a revolutionary measure passed by a narrow majority under the Parliament Act, might in emergency be revived. It is useless to seek to settle when a convention is finally decided upon. That of ministerial solidarity was violated by agreement in 1931, but the value of the convention was attested by the failure of the experiment in 1932—33.

(y) See Keith, *The King and the Imperial Crown*, pp. 130 ff.; *The British Cabinet System, 1830—1938*, pp. 43 f.

**Sanction of Conventions.**—What, then, is the power which enforces (z) the observance of the only vital conventions, namely, those which constitute responsible government? The fear of impeachment, once real, is obsolete, and other grounds must be sought. One vital reason is that politicians grow up in traditional habits of mind: they play a game according to tacitly observed rules. But with the advance of democracy this habit of mind is changing as Dominion experience (a) shows, and, so far as conventions must be observed, a further ground is necessary. That lies in the fact that a ministry which defied the Commons would find itself without legal authority to expend funds, and on the expiration of the annual Army and Air Force Act the maintenance of these forces would be illegal. The courts are no longer subservient to the Crown, since the judges, though appointed by the Crown, are, by the terms of the Act of Settlement (b), dismissible only on an address from the two Houses of Parliament. It is easy to foresee that the courts would not support the Ministry in any illegal measures; the Ministry would thus be forced to resign, or the government of the country would come to a standstill. In the last resort the King would doubtless dismiss a recalcitrant ministry, as he is bound to uphold the constitution. )

It is true that the actual operation of sanctions is rare but it is equally true that the question of the legality of expenditure proved a vital factor in the calculations of the Conservative leader and Mr. A. Chamberlain in 1910, when they were considering the possibility of Mr. Balfour taking office on the refusal of the King to agree to the creation of peers. They realised that the Comptroller and Auditor-General would not act illegally, and that the Bank of England would not lend funds without complete legal safeguards (c). It is true that, if a ministry had passed the Appropriation Act, it could hold on for a time, but in all probability its ultimate fate would only be the worse. In the case of the Dominions the financial sanction alone is normally operative, and normally is not requisite, but it is interesting to note that the country party by the threat of refusing to pass the Budget compelled the Prime Minister of the Commonwealth of Australia to forego his injudicious proposal to dissolve Parliament simultaneously with the constitutional referendum on the extension of federal power in 1937, and that the Premier of Alberta was by revolt on the Budget compelled to capitulate in April, 1937, to the demands of the more advanced of his supporters for the preparation of a scheme of social credit.

[The force of the law, then, is the sanction upon which the observance of conventions ultimately depends, and this is what is meant when it is said that *conventions are ultimately dependent upon the law of the land*.

It has been objected to this view that the law cannot be enforced against the government, but illegal actions by ministers or officials can

(z) Dicey, *Law of the Constitution*, ch. xv.

(a) In 1932 the Governor of New South Wales had to dismiss his Premier for deliberate violation of Commonwealth legislation declared by the High Court to be binding on the State: Keith, *The Dominions as Sovereign States*, p. 230.

(b) 12 & 13 Will. III. c. 2, s. 3; and see 15 & 16 Geo. V. c. 49, s. 12.

(c) Keith, *The British Cabinet System, 1830—1938*, pp. 372, 408.

be pronounced to be such by the courts, and, if the executive declines to give effect to judgments, its action is revolutionary, and lies outside the scope of this discussion.)

### *Constitutional Landmarks.*

The four great statutory landmarks of the English Constitution are Magna Carta (1215), the Petition of Right (1628), the Bill of Rights (1689), and the Act of Settlement (1701).

**Magna Carta.**—On June 15, 1215, the barons, who had renounced their allegiance and taken up arms in order to enforce a settlement of their grievances, met King John at Runnymede, and presented articles containing an outline of the concessions required. The King accepted the terms contained in the articles, and executed the Great Charter in which those terms were embodied upon the same day (*d*). Up to the reign of Henry VI. the charter was renewed thirty-seven times.

The principle provisions of the Charter were as follows :—

- ✓ (1) Heirs were to enter upon their possessions upon payment of the customary relief, and infants upon coming of age were not to pay either relief or fines. Wardship and marriage were regulated, and mesne lords were only to exact the normal aids.
- ✓ (2) Land was not to be taken in execution for debt if sufficient chattels were to be found.
- ✓ (3) The City of London was to enjoy its ancient customs and liberties.
- (4) No scutage or aid was to be imposed without the common counsel of the realm, except the three customary feudal aids, ransoming the king, knighting his son, and giving a dowry to his eldest daughter.
- (5) To have the common counsel of the realm for the purpose of assessing aids and scutages, were to be summoned the following persons: (1) Archbishops, bishops, abbots, earls, and greater barons by individual writ; (2) all other tenants in capite by general writ addressed to the sheriff.
- ✓ (6) The Common Pleas were not to follow the King's Court, but were to be held in a fixed spot (*in aliquo certo loco*).
- ✓ (7) Fines were to be regulated according to the magnitude of the offence, and earls and barons were not to be fined except by their peers.

(*d*) For the Articles of the Charter itself, see Statutes of the Realm, pp. 6—13; Stubbs, *Sel. Chart.*, pp. 291—303. The Charter's importance in constitutional history is in part one of sentiment, but is largely due to the extensive interpretation put on its terms by public opinion and even by the Courts. Pitt's notions of constitutional law were largely based on a popular interpretation of Magna Carta. Cf. W. McKechnie, *Magna Carta* (1914); *Magna Carta Commemoration Essays* (1917). For its reactionary tendencies as a baronial claim of customary rights, see Petit-Dutaillis, *Feudal Monarchy in France and England*, pp. 358 ff.; but cf. Jolliffe, *Const. Hist. Medieval England*, pp. 247 ff.

- (8) No sheriff, constable, or coroner, or other officer of the Crown, was to hold pleas of the Crown, which thus were reserved to the royal justices.
- (9) No freeman was to be arrested, imprisoned, put out of his freehold, outlawed, exiled, destroyed, or put upon in any way except by the lawful judgment of his peers or the law of the land (e).
- (10) Justice was not to be sold or denied to any one, or to be delayed.
- (11) Merchants were to be free to enter and leave the kingdom, and to remain there for purposes of buying and selling, subject only to the customary tolls.
- (12) Justices, constables, sheriffs, and other officers of the Crown were only to be appointed from upright persons possessing knowledge of the law.
- (13) All lands afforested in the reign of King John to be forthwith disafforested; the forest laws to be reformed.
- (14) Twenty-five barons were to be chosen as representatives of the nation, the King contracting to allow them to see that the terms of the Charter were enforced and observed; a provision unworkable no doubt and a proof of constitutional immaturity but a valuable testimony to the contractual aspect of feudal monarchy, and a fundamental assertion of the subjection even of the King to restrictions imposed by law (f).

**The Petition of Right, 1628 (g).**—After reciting the various statutes by which the liberties of the subject had been assured (h), and the various infringements of those statutes which formed the present subject of grievance, including the issue of commissions to try offenders by martial law, the Petition of Right humbly prayed His Majesty as follows:—

- (1) That no man should be compelled to make or yield any gift, loan, benevolence, or tax without common consent by Act of Parliament.
- (2) That no freeman should be forejudged of life or limb, or imprisoned or detained against the form of the Great Charter and the law of the land.

(e) This clause was later deemed the source of *habeas corpus* and trial by jury. Neither then existed; the peers were in the case of the tenants-in-chief their fellow suitors in the King's Court; of the tenants of mesne lords, their fellow suitors in the lord's Court. The rule, however, is an enunciation of the reign of law as opposed to arbitrary royal arrest; *Magna Carta Comm. Essays*, pp. 78—121. The distinction between judgment, or the law, is due to the new Assize procedure, where there was no judgment in the old sense.

(f) This is clearly asserted by Bracton under Henry III.: *Petit-Dutaillis, Feudal Monarchy in France and England*, pp. 354, 355. The model for these barons was the practice of barons swearing to make war on their lord if he breaks a treaty to which they had sworn; cf. the treaty of 1201 between John and Philip.

(g) 3 Car. I. c. 1.

(h) The statutes particularly mentioned are the *Statutum de Tallagio non concedendo* (34 Edw. I. st. 4, Ruff.); a statute of 25 Edw. III. against forced loans (Rot. Parl. ii, 238); 1 Ric. III. c. 2; *Magna Carta*; and the 28 Edw. III. c. 3.

- ✓(3) That soldiers and marines should not henceforward be billeted upon private persons.
- ✓(4) That commissions should not be issued to try persons according to the law martial, as is used by armies in time of war.

To this petition the answer was appended by the King, "*Soit droit fait come est désiré.*"

**The Bill of Rights, 1689** (*i*).—The Bill of Rights, after reciting the various ways in which James II. had infringed upon the liberties of the subject, and that, the throne being vacant by the abdication of James II., the Prince of Orange had caused letters to be written summoning such representatives as would ordinarily be elected for Parliament to meet and sit at Westminster, declared as follows:—

- ✓(1) That the pretended power of suspending of laws or the execution of laws by regal authority without consent of Parliament is illegal.
- ✓(2) That the pretended power of dispensing with laws or the execution of laws as it hath been assumed and exercised of late is illegal.
- ✓(3) That the commission for erecting the Court of Commissioners for Ecclesiastical Causes and all other commissions and courts of like nature are illegal and pernicious.
- ✓(4) That levying money for or to the use of the Crown by pretence of prerogative without grant of Parliament or for longer time or in other manner than the same is or shall be granted is illegal.
- ✓(5) That it is the right of the subject to petition the King and all commitments and prosecutions for such petitioning are illegal.
- ✓(6) That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against law.
- ✓(7) That Protestant subjects should have arms for their defence as allowed by law (*k*).
- ✓(8) That the election of members of Parliament ought to be free.
- ✓(9) That freedom of speech and debates, or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament.
- ✓(10) Excessive bail ought not to be required (*l*) nor excessive fines imposed, nor cruel and unusual punishments inflicted.
- ✓(11) That jurors ought to be duly impanelled and returned, and in treason cases should be freeholders (*m*).

(*i*) 1 Will. & Mar. sess. 2, c. 2.

(*k*) Training in arms without authority is illegal by 60 Geo. III. c. 1. The carrying of arms is now regulated by the Firearms Act, 1937 (1 Edw. VIII. & 1 Geo. VI. c. 12).

(*l*) The effect of the Habeas Corpus Act, 1679 (31 Car. II. c. 2), had been lessened by the demand of excessive bail.

(*m*) Packed juries had been used under Charles II. against his enemies, and the refusal of the Grand Jury to indict Shaftesbury had led to *quo warranto* proceedings to cancel the Charter of London; Hallam, Const. Hist., ii, 448 ff.

- (12) That all grants and promise of fines and forfeitures of particular persons before conviction are illegal and void.
- (13) That for redress of all grievances and for the amending, strengthening, and preserving of laws, Parliaments ought to be held frequently (*n*).

The Act further vested the Crown in William and Mary of Orange during their lives and the survivor of them, providing that the regal powers should be only in and exercised by the Prince of Orange during their joint lives. The further limitations were: (1) to the heirs of the body of Mary; (2) to the Princess Anne of Denmark and the heirs of her body; (3) to the heirs of the body of William (Prince of Orange). These limitations were made subject to the following provisions:—

- (1) That any papist or person marrying a papist should be excluded from inheriting, possessing, or enjoying the Crown.
- (2) That every King and Queen should make, subscribe, and repeat the declaration against transubstantiation and certain doctrines of the Roman Church contained in the Statute 30 Car. II. st. 2, c. 1.
- (3) That no dispensation by *non obstante* to any statute or part thereof should in future be allowed, except in so far as permitted by Statute (*o*).

**The Act of Settlement, 1701.**—In the year 1701, Mary being dead and William III. in a dying condition, whilst the Princess Anne of Denmark seemed past the age of child-bearing, and all her children had predeceased her, it became necessary to extend the limitations of the Crown contained in the Bill of Rights, so as to provide for the devolution of the Crown in the event of their failure, which actually happened on the death of William III. and Anne of Denmark (*p*).

The Act of Settlement therefore declared that the Princess Sophia, Electress and Duchess Dowager of Hanover, daughter of the Princess Elizabeth, late Queen of Bohemia, daughter of James I., was to be the next in succession in the Protestant line, to the Imperial Crown, and dignity of the realms of England, France, and Ireland, with the dominions and territories thereunto belonging, in default of the issue of the Princess Anne of Denmark and of H.M. William III. The further limitation was to the heirs of the body of the Princess Sophia. These limitations were made subject to the following provisions:—

- (1) That any person inheriting the Crown under the Act who should profess the Roman Catholic religion or marry a papist should

(*n*) Charles II. had hastily dissolved Parliament in 1681 and never summoned another, and James II. prorogued (1685) and ultimately dissolved (1687) even his subservient Parliament when it showed signs of religious scruples; Hallam, iii, pp. 50 ff.

(*o*) In the following year (1690) an Act of Recognition (2 Will. & Mar. c. 1) was passed acknowledging the King and Queen and legalising the Acts of the last Parliament. This followed the precedent of 13 Car. II. st. 1, c. 7, as regards the Acts of the Convention Parliament.

(*p*) 12 & 13 Will. III. c. 2.

be subject to the incapacities provided by the Bill of Rights (1 Will. & Mar. sess. 2, c. 2).

- (2) That persons inheriting the Crown should take the coronation oath provided by the Act for Establishing the Coronation Oath, 1689 (1 Will. & Mar. sess. 1, c. 6), and subscribe and repeat the declaration against transubstantiation prescribed by the Bill of Rights.
- (3) That any person coming into possession of the Crown under the Act should join in communion with the Church of England.
- (4) That in the case the Crown should come to any person not being a native of England, this nation should not be obliged to engage in any war for the defence of any dominions or territories which do not belong to the Crown of England (g), without the consent of Parliament.
- (5) That no person born outside the United Kingdom (although he be naturalized (r) or made a denizen, except such as are born of English parents) should be capable to become a Privy Councillor or a member of either House of Parliament, or to enjoy any office or place of trust either civil or military, or to have any grant of lands from the Crown to himself or to any others in trust for him.
- (6) That no pardon under the Great Seal should be pleaded as a bar to an impeachment by the Commons in Parliament.
- (7) The commissions of judges were to be "quamdiu se bene gesserint," but, upon the advice of both Houses of Parliament, it should be lawful to remove them (s).

(g) The contrast is here clear between territories, *e.g.*, the colonies, which are described in the Coronation oath as dominions belonging to the United Kingdom, and territories united only by the tie of personal connection like Hanover. Cf. *Craw v. Ramsay* (1670), Vaugh. 274; Keith, Const. Hist. First British Empire, pp. 382 ff.

(r) A naturalized alien, however, can now be a privy councillor: *R. v. Speyer*, [1916] 2 K. B. 858. The Act of Settlement no longer applies to naturalized persons, but continues to apply to persons made denizens by the prerogative of the Crown. *Ib.* See 4 & 5 Geo. V. c. 17, s. 3.

(s) William III. in 1692, refused his assent to a Bill for this end; on the natural subservience of judges even in the eighteenth century, see Hallam, Const. Hist., iii, 194 ff., a very significant passage.

## CHAPTER II.

## THE CHARACTERISTICS OF ENGLISH CONSTITUTIONAL LAW.

THE leading characteristics of the English Constitution, which form its essential principles, are:—

- ✓(1) The system of Parliamentary Government and the regime of Political Parties.
- ✓(2) The sovereignty of Parliament and the flexibility of the Constitution.
- ✓(3) The rule of law.

(1) *The System of Parliamentary Government.*

The vital characteristic of the English constitutional system is the solution of the relations between executive and legislature by the plan of responsible government. Under it the powers of the Crown are in fact exercised by Ministers (a) responsible to the majority of the House of Commons, and they in turn represent the will of the electorate. That will is necessarily formed by means of the party system.

**Party Organisation.**—Prior to 1832 political parties were mainly confined to Parliament itself. The extension of the electorate in 1832 pointed to the necessity of means of securing concerted action in the spread of political principles, and the promotion of registration of electors—required under the Act of 1832—and the selection of candidates. The further extensions of 1867, 1884, 1918 and 1928 have enhanced the necessity of organisation. Peel saw that the registration of voters was “a perfectly new element of political power which might be more powerful than the House of Commons,” and by 1841 had secured the establishment of a central party organisation in connexion with local associations. The interests of Liberals and Radicals were served by the Reform Association and the Reform Club, and a central registration office (1835). The Conservatives in 1867, the Liberals in 1877 (b), adopted the plan of federal organisation of local associations with central bodies, now styled the Union of Conservative and Unionist Associations and the Liberal Party. Annual conferences of representatives discuss policy, and elected councils keep in touch with the party leaders. But since the difficulties caused to the Liberal party in 1892—95 by the adoption of the Newcastle programme of 1891, efforts have been more or less successfully made to reduce the functions of the

(a) See Part III., Chap. II., *post*.

(b) Their policy was directed by Mr. F. Schnadhorst who had organised Birmingham for Mr. J. Chamberlain when in 1867 “three-cornered” constituencies existed in which the voter had one vote less than the number of seats to be filled. On parties, see Keith, *The British Cabinet System, 1830—1938*, pp. 256 ff.

conference to homologation of policies adopted by the party leaders, and in the case of the Unionists initiative has always rested with them. After the Liberal split in 1932—33, there was a determined effort, resulting in the reconstruction in 1936 of the party organisation, the National Liberal Federation, to restore authority to the rank and file. In the case of the Liberal Nationals, the Liberal National Council, the distinct organisation created since 1933 necessarily leaves control of policy to the leaders who inevitably have to follow the lines dictated by the Conservative Party leaders who commanded the fate of seats in 1935. From the power of the leaders it follows that, when out of office, the party is guided in Parliament by a "Shadow Cabinet," composed normally of the ex-Prime Minister and his colleagues in the late Cabinet to whom one or two men of special promise may be added. This can be traced back to Sir Robert Peel after his resignation in 1835.

Labour party organisation may be dated from 1900, when a Labour Representation Committee was formed. It was originally based on trade unionism and socialist societies, and made no claim to represent the people in general. But from 1918 its constitution was rendered wider, and local parties of individual members, united only by political agreement, were admitted to share with trade unions, socialist organisations, and, since the alliance of 1927, local co-operative societies, the right to be represented in the annual Labour Conference, and to elect the twenty-five members of the Executive Committee which controls the Central office. The Conference claims to control policy, but it has to act with the close co-operation of the Trades Union Congress and its executive, for the essential funds for elections are largely obtained from the unions, which mainly supply also the other funds needed by the party. Control over candidates is thus close; local selection is allowed, but central endorsement is requisite, and candidates must accept a pledge to act, if elected, in accordance with the party constitution and standing orders. They are thus compelled to subordinate their judgment on issues of importance to the course decided on by the Labour members in Parliament. The Parliamentary Labour Party itself appoints an Executive which with the General Council of the Trades Union Congress and the executive of the Labour Party, forms the National Joint Council to deal with issues of basic character; thus in 1938 it issued declarations on foreign policy in respect of Spain and Czechoslovakia. When Labour is in office, the Parliamentary Party elects a consultative committee to keep in touch with Ministers; when out of office, its business is managed by an executive committee.

Since 1929 affiliated organisations are bound to accept the principles and policy of the party, to conform to its constitution and standing orders, and to submit their rules to the Executive, a negation of independence leading to the severance from the party of its former ally, the Independent Labour Party, in 1932, and its emergence as a distinct political party, while in 1937 the Socialist League was likewise banned.

In 1939 the Executive by eighteen votes to one expelled Sir Stafford Cripps because he had against its wishes circulated a memorandum in favour of dropping extreme socialism as the immediate party policy and urging co-operation with the Liberals, and others to secure

ejection of the Ministry from power. His expulsion carried with it exclusion from membership of the Parliamentary party, and evoked a considerable amount of comment in addition to his declaration of an appeal to the Annual Conference.

In the case of the Conservative and Liberal National Parties, the Central Office, which controls party funds derived largely in the past from payment for honours, a practice penalised by statute (c), retains wide authority over candidates, who are selected by local associations, by reason of its power to grant or refuse pecuniary aid (d). A recent development is the raising of smaller subscriptions locally from party supporters as opposed to pressing peers and M.P.'s to provide funds, the Liberal Party has had largely to rely on such action as very modest sums were placed at its disposal from the fund formed under the coalition government by Mr. Lloyd George, and since 1931 that leader has stood out as an Independent Liberal with three followers in the Commons.

**Executive Control of Parliament.**—Through the party system the electorate virtually at a general election vote for a leader who, in the event of a majority being returned, shall form the dominant factor in government, a fact made plain by the manifestos now issued in the name of the party chiefs. The solidarity of support in the Commons is ensured by a variety of grounds. A member is carefully selected with regard to his probable fidelity to the party tenets and leader; on this rest his chance of office or honour or other advancement for himself or friends, and his power of influencing the Ministry to take up legislation in which he is interested and to give it facilities if introduced as a private member's bill; if he deserts the party on an important issue, his supporters will object; a dissolution may result, and he will probably lose his seat, and in any case will have to fight without aid in funds or central approval.

The ministry, if it remains in unison and does not evolve disagreement as in 1931, has quasi-dictatorial powers. Its authority in executive matters is enormous; it controls a very large number of important appointments in the civil and defence departments; it determines many issues of policy in the working of the great offices of state; its control of the military, naval and air forces is almost absolute (e). In foreign affairs it is supreme: only when it hopelessly misreads the public mind, as in the case of the Hoare-Laval proposals of 1935 regarding Ethiopia, is its action seriously called into question, and even so it can make its will prevail by some formal concession (f). In September,

(c) See Parl. Paper, Cmd. 1789. Honours (Prevention of Abuses) Act, 1925 (15 & 16 Geo. V. c. 72).

(d) See H. Finer, *Modern Government*, i, pp. 488 ff. In January, 1939, a Conservative candidate attacked the system under which constituencies refused to consider candidates who would not pay all election expenses, and up to £500 a year for party expenses.

(e) Thus the House of Commons (January 26, 1937) acquiesced in the refusal of the Ministry to reconsider its decision to remove from their employment in the dockyards five men against whom no criminal proceedings were taken.

(f) The resignation of Sir Samuel Hoare, the Foreign Secretary, was not followed by any fundamental change in policy, and Mr. Eden, in 1936, advised the League of Nations to abandon sanctions, despite the categorical terms of the League Covenant,

1938, the Prime Minister, reversing a policy shortly before announced, concluded an agreement at Munich with Herr Hitler under which Czechoslovakia was dismembered, despite the obligations of the Crown under Articles 10 and 20 of the League Covenant to preserve its territorial integrity and political independence, and his policy was accepted by the Cabinet, with the exception of Mr. Duff Cooper, and by 366 to 144 votes by the House of Commons.

On the other hand, the electorate may by a distinct expression of view cause a reversal of policy, as in the case of the withdrawal of the Milk Bill in December, 1938, and in January, 1939, the substitution of Sir R. Dorman-Smith as Minister of Agriculture for Mr. Morrison. In like manner the amendment of s. 6 of the Official Secrets Act, 1920, was secured by an effective and widespread Press campaign.

The Ministry exercises by delegation from Parliament wide legislative and judicial functions in matters deeply affecting the public health and social conditions. It alone decides all financial questions, it controls initiation of legislation, and commands the time of Parliament. Its allegiance, formally due to the Commons, is essentially owed to the electorate, the political sovereign (*g*), and the duty of the majority of the Commons is to carry out the policy put before the electorate by their leaders. Most significant of all instances of the power of a ministry with a large majority is the abdication of Edward VIII., who declined to attempt to seek a vote from the Commons in his support on the issue of his proposed marriage, and negatived any idea of a King's party (*h*). Equally remarkable was the whole-hearted backing given in 1936—39 to rearmament, though that had been decidedly ruled out in the electoral struggle in 1935.

## (2) *The Sovereignty of Parliament.*

**Omnipotence of Parliament.**—The sovereignty or omnipotence of Parliament means that Parliament is the supreme power in the State, in the sense that it can make or unmake any law; that the courts will obey its legislation; nor is there any power in the State capable of overriding, curtailing, or prescribing its authority. Thus Parliament can legislate for all matters done or to be done on territory under control of British officers, whether in or without the British dominions, and for British subjects wherever they may be (*i*); moreover, British courts must obey Acts even if they affect foreigners not on British territory, if they are clearly worded to deal with such cases, though normally it will be assumed that a British Act does not deal with actions of

Article 16, and the breach of international law involved. See Keith, *Letters on Current Imperial and International Problems*, pp. 145 ff. In February, 1938, Mr. Eden resigned, being reluctant to conclude an agreement with Italy; this agreement, made operative in November, 1938, led to the formal recognition of the King of Italy as Emperor of Ethiopia. See Keith, *The British Cabinet System, 1830—1938*, pp. 553, 558; on Cabinet control generally, see pp. 278 ff.

(*g*) See R. Muir, *How Britain is Governed* (1930). Cf. Sir S. Cripps' proposal in 1933—34 that socialism should be enacted by Orders in Council under emergency powers given by Parliament.

(*h*) Mr. Baldwin, December 10, 1936; 318 H. C. Deb. 5s. 2193.

(*i*) *Earl Russell's Case*, [1901] A. C. 446.

foreigners not on British controlled territory (*k*). Even Parliament itself cannot curtail the powers of subsequent Parliaments, it being a maxim of the common law that "Acts derogatory to the power of subsequent Parliaments bind not" as shown by the abrogation by 1 Edw. VI. c. 11 of 28 Hen. VIII. c. 17 despite the effort by the latter Act to prevent operation of Acts passed during a royal minority (*l*). Therefore we see upon our Statute-books the Irish Church Act of 1869 disestablishing the Irish Church, though by the Act of Union, 1800, the maintenance of the Irish Established Church was made a fundamental condition of the Union of the two countries (*m*). As instances of the supreme legislative authority of Parliament, we may cite the Bill of Rights, 1689 (*n*), by which, on the flight of James II., the throne was declared vacant, the Crown conferred upon William and Mary, and the succession settled; the Septennial Act, 1716 (*o*), by which Parliament prolonged its own existence from three to seven years; the Parliament Act, 1911, by which it curtailed its existence from seven to five years, and subordinated the House of Lords to the Commons; the Indemnity Act, 1920, condoning many illegal actions done in the war; and the Statute of Westminster, 1931, redefining the relations of the United Kingdom and the Dominions. It is significant that even of this vital statute the Lord Chancellor could say that "indeed, the Imperial Parliament could, as a matter of abstract law, repeal or disregard section 4 of the Statute. But that is theory and has no relation to realities" (*p*).

It has indeed been suggested that Parliament can lay down rules limiting its own power and that there are no cases to the contrary. This overlooks the fact that it has twice been ruled that the attempt in the Acquisition of Land (Assessment of Compensation) Act, 1919 (s. 7), to limit for all future Acts the mode of assessment is invalid, since it is impossible for Parliament to limit its enactments, and effect must be given to the differing provision of s. 46 (1) of the Housing Act, 1925. The matter is thus settled (*q*).

(*k*) *Lopez v. Burslem* (1843), 4 Moo. P. C. 300; *The Amalia* (1863), 1 Moo. P. C. (N. S.) 471; *Keegan v. Dawson*, [1934] Ir. R. 232; *R. v. Keyn* (1876), 2 Ex. D. 63 (the exact point there decided was legislatively reversed by the Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict. c. 73)). The Government of Burma Act, 1935 (26 Geo. V. & 1 Edw. VIII. c. 3), s. 34 (a), asserts power to legislate for Burma, which includes non-British territory (sect. 158 (1)), and the Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37) confers power to legislate for all purposes and persons in protectorates.

(*l*) See Bacon, Works, vi, 159, 160.

(*m*) The treaty of Union with Scotland in 1706 (6 Anne, c. 11) was violated by 10 Anne, c. 21, restoring, with serious results, patronage in the Church of Scotland (repealed by 37 & 38 Vict. c. 82), and by 16 & 17 Vict. c. 89, s. 1, relieving professors of Scottish Universities from necessity of subscribing the confession of faith; see now the Churches (Scotland) Act, 1905 (5 Edw. VII. c. 12), s. 6 (2), and the Universities (Scotland) Act, 1932 (22 & 23 Geo. V. c. 26), s. 5.

(*n*) 1 Will. & Mar. sess. 2, c. 2.

(*o*) 1 Geo. I. st. 2, c. 38.

(*p*) *British Coal Corporation v. The King*, [1935] A. C. 500, 520. Cf. also on the Regency Bill, 1937, 319 H. C. Deb. 5s. 1834.

(*q*) *Ellen Street Estates, Ltd. v. Minister of Health*, [1934] 1 K. B. 590; *Vauxhall Estates, Ltd. v. Liverpool Corpn.*, [1932] 1 K. B. 733. Cf. *Associated Newspapers, Ltd. v. London City Corpn.*, [1913] 2 K. B. 281; [1914] 2 K. B. 603; [1915] A. C. 674.

**Freedom from Legal Control.**—The paramount power of Parliament has been achieved only by degrees. The King formerly claimed the right of legislation by proclamation or ordinance, and of suspending or dispensing with the operation of laws (*r*), but these claims are obsolete save in respect of conquered and ceded colonies (*s*). The judge occasionally claimed the right to disregard statutes if repugnant to reason and morality (*t*), but the doctrine became untenable as soon as the judges ceased to be part of the legislature and became advisers merely, and, save in so far as it accords a basis of interpretation, is obsolete (*u*). The Court will not correct legislative lapses. Nor will judges disregard statute law even if it seems to contravene international law (*x*). What weight the Covenant of the League of Nations has rests on its legal enactment. They will, of course, assume, unless the wording of an Act forbids, that Parliament knows and will not violate international law, thereby exposing the country to risk of international claims (*y*), but they will give effect to clear terms of an Act asserting a far-reaching jurisdiction over foreign fishermen in the Moray Firth, leaving it to the executive to refrain from operating the statute, if international considerations commend that course of action (*z*).

The case of *Stockdale v. Hansard* (*a*) is instructive as showing that neither House can by its own resolution negative the effect of an Act of Parliament, nor make any new law. In that case the House of Commons had authorised Hansard to publish a report which contained a libel upon Stockdale; Stockdale sued Hansard for libel, and the authority of the House of Commons was pleaded in justification. It was held that the House of Commons cannot by its own resolution render defamatory matter non-libellous. In consequence of this decision and in order to render the publishers of Parliamentary reports immune from the consequences of libel, it was necessary to pass an Act in 1840 (*b*) providing that a certificate in such cases, signed by the necessary officials, stating that the publication was by order of the House, should operate as a stay of proceedings. Similarly in *Bowles v. Att.-Gen.* (*c*) it was made clear that, despite fairly long usage, taxes

(*r*) See Part III., Chap. IV., *post*.

(*s*) See Part IX., Chap. III., *post*.

(*t*) Cf. *Day v. Savadge* (1614), Hobart, 87; Keith, Constitutional History of First British Empire, pp. 359, 360.

(*u*) *Lee v. Bude and Torrington Ry. Co.* (1871), L. R. 6 P. C. 576; *Wingrove v. Morgan*, [1934] Ch. 423. The same rule has been repeatedly laid down in the Irish Free State in respect of Irish legislation creating a Constitution (Special Powers) Tribunal authorised to impose sentences at discretion, and compelling prisoners to answer questions, on the strength of which they can be convicted: *The State (O'Duffy) v. Bennett*, [1935] Ir. R. 70, 97 ff, *per* Hanna, J.; *The State (McCarthy) v. Lennon and Others*, [1936] Ir. R. 485.

(*x*) *Re Californian Fig Syrup Co.'s Trademark* (1884), 40 Ch. D. 620; *Niboyet v. Niboyet* (1879), 4 P. D. 1, 20; *Croft v. Dunphy*, [1933] A. C. 156; *The Bathori*, [1934] A. C. 91, 98. See Part VI., Chap. I., *post*.

(*y*) *West Rand Central Gold Mining Co. v. R.*, [1905] 2 K. B. 391; *Emperor of Austria v. Day* (1861), 2 Giff. 628; *R. v. Keyn* (1876), 2 Ex. D. 63.

(*z*) *Mortensen v. Peters* (1906), 8 F. (J. C.) 93, 101, *per* Lord Dunedin, cited in *Compania Naviera Vascongada v. S.S. Cristina*, [1938] A. C. 485, 497.

(*a*) (1839), 9 A. & E. 1.

(*b*) 3 & 4 Vict. c. 9.

(*c*) [1913] 1 Ch. 57; 3 & 4 Geo. V. c. 3. A contrary view is taken in Australia: *Sargood Bros. v. Commonwealth* (1910), 11 Commonwealth L. R. 258.

could not be collected on the strength of a resolution of the House of Commons, and the Provisional Collection of Taxes Act, 1913, was necessary to authorise such action.

**De Facto Limits of Power.**—Though Parliament is thus omnipotent, there must be what are termed the *external* and *internal* limits to its power. Externally the power of Parliament is limited by the possibility of resistance to its enactments, either passively, as by the non-payment of rates or taxes by way of protest against any particular measure, of which there have been some examples (*d*), or by active force, or menace thereof as in the general strike of 1926. But in this connection it must be remembered that under the Treason Act, 1352 (25 Edw. III. st. 5, c. 2), the use of force, if it amounts to levying war against the King in his realm, or to an insurrection accompanied by violence for an object of a public or general nature constitutes the offence of treason; and that levying war against the Sovereign within the United Kingdom in order by force or constraint to compel him to change his measures or counsels, or in order to put any force or constraint upon, or in order to intimidate or overawe both Houses or either House of Parliament (which would probably be held to extend to an insurrection for any of the like purposes), constitutes treason felony under the Treason Felony Act, 1848 (*e*). The Trade Disputes and Trade Unions Act, 1927 (17 & 18 Geo. V. c. 22) renders illegal any strike designed to coerce the government either directly or by inflicting hardship on the community; the Emergency Powers Act, 1920 (10 & 11 Geo. V. c. 55), arms the executive with strong means of meeting organised attack on the administration; and the Public Order Act, 1936 (1 Edw. VIII. & 1 Geo. VI. c. 6), strikes at the danger due to the wearing of uniforms by members of political organisations, and their usurpation of the duties and rights of the police force.

The internal limit arises from the inherent character of Parliament itself, as reflecting the moral and intellectual stage of development of the community at large, and the impossibility of its passing measures radically opposed to its own sense of fitness, and therefore ultimately to the sense of fitness of the electorate whom it represents. And here we once more come to the fundamental dogma of modern constitutionalism: that the legal sovereignty of Parliament is subordinate to the political sovereignty of the nation (*f*). This subordination has become possible through the wide dissemination of political knowledge by means of the Press since its complete release from control.

An interesting side of this self-limitation is the fact that as regards the Dominions the Statute of Westminster, 1931 (*g*), formally asserts the principle that legislation should be subject to their request and consent, and that in the case of other oversea territories legislation is confined within certain definite limits, leaving as far as possible local

(*d*) The Education Act, 1902 (2 Edw. VII. c. 42), produced vehement resistance, especially in Wales, which lasted for years. Lord Salisbury did not approve the policy which was largely due to Mr. Morant: Dugdale, Arthur James Balfour, I, pp. 323 ff.; Halévy, *Hist.*, 1895—1905, pp. 201 ff.

(*e*) See p. 459, *post*.

(*g*) 22 & 23 Geo. V. c. 4, s. 4.

(*f*) Dicey, *Law of the Constitution*, p. 449.

matters to local legislation. So, again, while the power of Parliament over Northern Ireland is unfettered, it is not normal for it to be exercised in any of the matters which the Government of Ireland Act, 1920 (*h*), has assigned to that territory. The reason is clear: if it did legislate, the pith and substance of self-government would disappear.

A most important development is the doctrine that no Parliament should pass important legislation on which the people has not given a mandate. Mr. Gladstone denounced the doctrine in 1868 when adduced by Mr. Disraeli (*i*); Sir H. Campbell-Bannerman and Morley had no liking for the doctrine, but Hartington denounced in 1886 the Home Rule Bill for Ireland on the score that the issue had not been presented to the electorate, and in 1893 he claimed that the form as well as the principle of such a measure must be made known at an election. But the Conservative administration of 1902—05 legislated on education and licensing, and permitted Chinese labour in the Transvaal, without any mandate. But in opposition the party revived the doctrine, and the House of Lords rejected on this ground the Finance Bill of 1909, and in 1913—14 claimed that a fresh mandate was necessary for the Government of Ireland Bill. On the other hand, rearmament in 1936—39 was undertaken without any mandate, the Ministry in 1935 having suggested that it contemplated no such need. On November, 12, 1936, the Prime Minister explained that he had realised two years earlier the need for rearmament, but could not propose it, as public opinion was not ripe for it. This remarkable doctrine can hardly be said to have been warmly received (*k*). A mandate was obtained for the Budget in 1910, and the Parliament Act, 1911; it was refused for tariffs in 1923; it was not asked for as regards food or raw materials in 1924, but it was accorded in 1931 and continued in 1935. The proposal for reform of the House of Lords in 1933 was objected to by Lord Reading on this ground. In 1924 and 1929 the Labour government did not attempt out-and-out socialist legislation. In 1933—34, on the other hand, it announced its intention to ask a mandate for a complete economic change; this was refused in 1935.

On the other hand, a most remarkable departure from a mandate was seen in 1936—39 as regards foreign affairs, the government having appealed to the country in 1935 on a policy of support of the League of Nations Covenant and collective security which it completely jettisoned. This was possible only through its ability to argue that the alternative to abandonment of its professed principles was war.

**Constituent Powers and Flexible Constitutions.**—The power of the British Parliament is also called *constituent*, that is to say, it has the power of making laws to effect changes in the constitution, and the constitution *flexible*, which means that as regards the procedure relating to enactment at least, though not, perhaps, as regards public opinion, such laws can be made with the same ease and by exactly the same process as ordinary laws. A non-sovereign law-making body, on the

(*h*) 10 & 11 Geo. V. c. 67.

(*i*) May, Const. Hist., iii, 71.

(*k*) Keith, *The King, the Constitution, the Empire, and Foreign Affairs*, 1936—37, p. 143.

other hand, such as a colonial legislature or an English railway company, is limited in its legislative powers by the terms of the Act by which it is constituted, and, though such a legislature or company can make or change its laws or bye-laws at pleasure, it can only do so within certain limits, and the courts have the power of deciding as to whether those laws are *ultra vires* the company or not. Similarly the courts must scrutinise the due mode of passing such laws or bye-laws, a power denied in the case of Acts of Parliament (l).

A striking example of the fundamental difference between a completely sovereign legislature and one of limited sovereignty is seen in the fact that, while the former cannot limit its own powers so as to bind itself (m), the latter can alter its constitution only within the limits set, and it can fetter its own future action. Thus the Parliament of New South Wales has disabled itself from abolition of the upper chamber except with the approval of the people at a referendum (n).

There are, of course, great differences in the powers of bodies not wholly sovereign; a colonial legislature is in a very different position from a local body, and a local body will be regarded as having wider powers than a railway company (o). But they are alike in the fact that they lack full sovereign power in the sense which here concerns us, the power to make rules which the courts will enforce, without questioning their validity.

**Contrast with Rigid Constitutions.**—The principal examples of non-sovereign law-making bodies of the present day are the various federal governments such as those of Switzerland, the United States, Canada, or Australia.

Federalism is historically due to the fact that there has existed among people in adjacent territories a desire for a closer form of co-operation than can be secured by a mere agreement between their governments to work together, each retaining full authority over its people, coupled with reluctance to accept a unitary form of government. They agree, therefore, to fall under the direct control in certain issues of a central government and Parliament, while in others they remain under the authority to which they have been accustomed. They may thus have two patriotisms, federal and local, and the character of the federal bond depends largely on which patriotism was the stronger when the federation was formed or amended.

Such federations are composed of a group of states who have united together to form a central government, whilst the state governments retain certain local powers of legislation and administration. The terms of the constitution are in such cases drawn up in a code assented to by the various states forming the union, and can only be changed by exceptional and usually lengthy processes. In most of them, e.g., Switzerland, the United States, and Australia, the central legislatures have strictly defined, and the local legislatures undefined, powers. In Canada the reverse is the case, the central legislature having residuary

(l) See p. 5, note (x), *ante*.

(m) See p. 17, *ante*.

(n) *Doyle v. Att.-Gen for New South Wales*, [1934] A. C. 511; *Att.-Gen. for New South Wales v. Trethowan*, [1932] A. C. 526.

(o) *Kruse v. Johnson*, [1898] 2 Q. B. 91; followed 59 T. L. R. 789.

as well as defined, and the local legislatures defined, powers. In all cases there is some authority which has the power of deciding as to the validity or otherwise of enactments passed by the central or local legislatures, and in most cases this power is given to the federal courts. The characteristics of such forms of constitution compared with our own are, it has been said, *rigidity* and *conservatism* as opposed to *flexibility*, and *weakness* as opposed to *strength*. Flexibility, of course, may be a danger in permitting too easy change, if rigidity runs the risk of creating revolution. Weakness, at any rate, is only comparative, for it is safe to say that the central government is stronger to effect the purposes for which it was created than the government of any individual state would have been. Another feature of federalism is *legalism*, or the necessary predominance given to the judiciary in making it the arbiter of the validity of laws enacted by the central or local legislatures. Less important is the characteristic that federal constitutions are necessarily *written*, as opposed to the British Constitution, of which much is *unwritten*, that is, unenacted, law. The practice of placing the principles of the constitution in one instrument is convenient, but a constitution in all cases requires to be supplemented by (a) legislation, (b) conventional practice, and (c) judicial interpretation. There is, of course, no inherent connection between a written constitution and difficulty of change. The Irish Free State had a formal constitution, but it was much easier to alter than that of the United Kingdom, and twenty-seven important amendments were made in the period to 1936. By the last of these the whole of the powers of the King in internal affairs were swept away by a mere majority in a unicameral legislature, the Senate having already been abolished, and it was only by a deliberate limitation of its own unfettered authority that it made a new constitution of Eire passed by it in 1937 subject to the approval of the people at a referendum. In the Union of South Africa a republican constitution could be introduced by a simple Act passed by ordinary majorities and assented to by the Governor-General who holds office at the pleasure of the ministry by which he is selected.

The constitutions of the United States and Switzerland illustrate not merely rigidity and legalism, but also, in this point contrasting with Canada and Australia (*p*), a type of executive wholly different from the British, and on these grounds deserve a brief account.

### *The American Commonwealth.*

The Constitution of the United States is contained in a document containing seven Articles, which was drawn up by a convention of the various states, at that time thirteen in number, in 1787. It was ratified by conventions of delegates in each state in 1787—89, and Vermont was admitted in 1791; thirty-four States have since been added. Twenty-one amendments have been passed, ten in 1791 as a statement of rights of fundamental character. But amendment No. 18, prohibiting the liquor traffic, was repealed by amendment No. 21 in 1933.

(*p*) See *post*, Part IX., Chap. II.

**Congress.**—The central legislative power is vested in the President and Congress, which consists of two Houses, the Senate and the House of Representatives.

**The Senate.**—The Senate is composed of ninety-six members, two representatives from each state, elected directly by the people (Amendment No. 17) for six years, one-third retiring every two years. It thus has a strong degree of continuity of composition, which strengthens it in contests with the lower house. The Vice-President of the United States is the President of the Senate, or in his absence a person chosen by the Senate itself. The Senate may propose bills (except money bills); it may amend all bills; its advice and consent are necessary to the President in the appointment of public officers including all those for whose choice no other provision is made by Congress, and the conduct of foreign affairs; and it has the sole power to try impeachments of the President and other public officers, judgment entailing loss of office and disqualification from holding further office under the Government. The Senate has thus executive as well as legislative functions, a fact which has greatly enhanced its importance. It is able to claim that it represents the states, while the House of Representatives represents the nation on the basis of population. Senators, like members of the House of Representatives, receive salaries of 10,000 dollars a year, and they have great prestige by reason, *inter alia*, of the fact that they by custom share in the determination of appointments made in their states, if they belong to the party in power. Special importance attaches to the chairmen of the committees through which the two Houses work, especially the chairman of the committee on foreign affairs in the Senate.

**The House of Representatives.**—The House of Representatives is composed of 435 members (*q*) elected for two years by the various states in proportion to the size of their populations, but not exceeding one for every 30,000; at present it is one for 281,000. It has the sole power of initiating money bills and instituting impeachments before the Senate, and equally with the Senate may initiate bills on other matters.

The assent of both Houses and of the President is required for the passing of a measure; if the President dissents, the measure is returned to the House which initiated it, and, if it is again passed by a majority of two-thirds in both Houses, it becomes law. This power was exercised even against President F. Roosevelt in respect of the Veterans' Bonus Bill in 1935.

**The Judiciary.**—The judicial power of the United States, or federal judiciary, is vested in the Supreme Court, and in inferior Courts (Circuit Courts of Appeals and District Courts) as established from time to time by Congress, the judges of which are appointed by the President and hold office during good behaviour. The Supreme Court has power to try all cases arising under the Constitution, and has

(*q*) Alaska and Hawaii have each a delegate, and Puerto Rico and the Philippines, to watch their interests. Amendment No. 19 gave females capacity to vote. The election falls in November.

original jurisdiction in cases where ambassadors or consuls or treaties are concerned, or where any state or the United States is a party. It consists of a chief justice and eight associate justices.

The judiciary of the Commonwealth is thus constituted the sole arbiter of the Constitution, each individual state having a Supreme Court of its own with exclusive jurisdiction in matters not involving the interpretation of United States statutes or falling within the jurisdiction of the Supreme Court of the United States. That court has no appellate jurisdiction from State Courts in matters of state law, contrasting in this with Canada and Australia.

In 1937 the President, resenting the action of the Court in pronouncing invalid certain parts of his "New Deal" legislation, proposed to Congress the addition of six justices to its nine members in order to secure a reversal of these decisions. This action was severely criticised as unconstitutional, and failed in the Senate. His efforts, however, clearly influenced the views of the court, one very Conservative judge retired, and was replaced by a lawyer of advanced views, and the Supreme Court then, with a distinct change of attitude, accepted certain important items of the New Deal. The Court has thus without drastic and unpopular intervention swung into harmony with the general tendency of opinion in the United States to a less drastic individualism and hostility to semi-socialistic ideas.

**Amendments of the Constitution.**—Amendments of the Constitution may only be proposed by Congress with the approval of two-thirds of both Houses, which is the only form adopted in practice, or by a convention summoned on the application of two-thirds of the state legislatures. The proposed amendments must subsequently be ratified by at least three-fourths of the state legislatures, or by conventions in three-fourths of the States, the procedure adopted for the first time in 1933 in respect of the repeal of the prohibition amendment (No. 18).

**State Legislatures.**—The powers of the state legislatures are defined by Article 10 of the Amendments of the Constitution, which enacts that the "powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." This article has secured to the States a very wide measure of freedom from the encroachment of the federal authority.

**The Executive.**—The central executive is vested in a President, who, under Amendment No. 12 (1804), is elected together with the Vice-President for four years in the following manner. A number of electors, equal to the whole number of senators and representatives that each state is entitled to send to Congress, are appointed in each state by popular ballot; the election takes place in November of the year before the expiration (fixed at January 20 by Amendment No. 20) of the President's term of office. These electors meet in December in their several states and give their votes separately for a President and Vice-President. By convention they have no discretion of choice but must vote for the candidate in whose support they have been returned. The real choice lies with the Democratic and Republican party con-

ventions who select the candidates for the parties. Lists of these votes are then made out and sent to the President of the Senate, who declares the result of the election according to the absolute majority of votes. Otherwise, the President is chosen by the House of Representatives from the three leading candidates by ballot, votes being taken by states, the representation of each state having one vote. In case of failure of a clear majority, the Vice-President is chosen by the Senate by ballot from the two highest candidates; his importance rests on his succession to the Presidency if the President dies in office. By a convention a President does not seek more than a second tenure of office. But President F. Roosevelt, whose term ends in 1941, has not declared explicitly that he will respect the convention, and circumstances might arise, *e.g.*, war risks, which might prevail over it. The President must be a native citizen, not less than thirty-five years of age, and his salary is 75,000 dollars.

The powers of the President are carefully defined, but by usage and statute they have become very great. He is the commander-in-chief of the naval and military forces including the state militias if in federal service, and in war or insurrection can exercise enormous authority. He has power with the advice and consent of the Senate to make treaties (provided two-thirds of those present concur); he controls all foreign negotiations and the diplomatic service, and appoints the judges, naval and military and certain other public officers, with the approval of the Senate. He is further empowered to convene and, in certain cases, adjourn Congress; he can send messages urging legislation and exercise a veto which cannot very easily be overridden. Since 1921 he suggests a budget, though Congress is free to deal as it pleases with it. Further, he is charged to see that the laws are faithfully executed. A wide power of making regulations rests with him, and he possesses the pardoning power.

The President, subject to the advice and consent of the Senate, appoints the State ministers, who are the heads of the ten State Departments created by Act of Congress, and are known as *the Cabinet*. He is empowered to require their opinion in writing on matters relating to their various departments, but no responsibility to Congress attaches to the ministers themselves; they are solely responsible to the President, who has the power of dismissal, and who alone is responsible to Congress for their acts, nor may they sit in Congress, and by an unfortunate convention they do not even address it (7).

**Essential Features of the Constitution.**—These points may be noted with regard to the American Constitution:—

- (1) The fundamental characteristic aimed at by the framers of the Constitution was the separation of the legislative, executive, and judicial departments (s), partly under the influence of Montesquieu (t), partly in the endeavour to safeguard liberty

(7) Taft, *Our Chief Magistrate and his Powers*, pp. 30—32; *Finer, Modern Government*, ii, 1017—1041.

(s) See Madison, *The Federalist*, XLVII.

(t) *L'Esprit des Lois*, bk. xi, ch. vi. On the medieval English constitution, with its separation between King and people, see B. Wilkinson, *Const. Hist. of 13th and 14th Centuries*, pp. 254 f.

and property, partly as the result of colonial conditions in which responsible government was unknown. But, while this is true of the judicature, it is only partially true of the executive and the legislature. It was hoped that the President would be outside of and above the sphere of party politics, but he is in fact normally the creature of the dominant party, and must necessarily be willing to carry out their policy. A man, however, of strong character may lead rather than follow as was done by President F. Roosevelt. He, it must be added, set a new precedent in party activities, for before the elections of 1938 when a third of the Senate as well as the House of Representatives fell to be elected, he made tours in the States urging the electors to vote for those candidates who favoured the New Deal at the party primary elections which are held in order to determine the choice of the party for their support at the elections proper.

- (2) Objection has been taken to the method of electing the President. Since the electors chosen by any state are all pledged to vote for the same candidate, the election is practically one of states. It is therefore possible for a President to be elected, as in 1876, who might not command a majority in a popular vote over the whole Union. A further objection is the turmoil into which the country is thrown by a Presidential election every four years, preceded by party conventions and at least six months' strenuous campaigning.
- (3) Through the multitude of appointments which are in the hands of the President, he has little time to attend to other matters, and a weak man tends to become a wire-puller engaged in questions of patronage rather than a great executive officer (*u*). This defect has been in some degree remedied by civil service reform, but remains grave; fundamental reorganisation was demanded from the new Congress in 1937. In 1938, however, only part of the wishes of the President was conceded, and a large measure of civil service reform was blocked in the House of Representatives. Much more serious is the lack of executive control over legislation and finance. The President may, as the House of Representatives is elected every two years, find himself out of political agreement with that house as during the last two years of President Hoover's tenure. But, even if the majority shares his views, he has no power to direct its action, though in a crisis as in 1933—37 it may well be that Congress will follow bold leadership (*x*) and the President in 1934—37 secured the establishment of a more intimate relationship between him and Congress. In 1936 the elections for Congress were dominated by the personality of the President who himself was re-elected by an almost unprecedented plurality. At the 1938 elections,

(*u*) See Finer, *Modern Government*, ii, 1025—1029.

(*x*) American opinion holds that presidential authority suffices, and that continuity outweighs any gain from close touch with the majority of the Legislature.

however, despite the efforts of the President to control the primaries, a considerable number of Democrats of rather Conservative views were elected, while the Republicans markedly improved their position, so that it was certain that the President would have difficulty in dealing with Congress in the next two years. But the reception of this message when Congress resumed in January, 1939, was not unfavourable, in so far as it stressed the ideals of democratic liberty, religious toleration, and the maintenance of international law and the sanctity of treaties, while a later message demanded great increases in defence expenditure.

- (4) The power of amendment is too restricted; inability to secure change in law results in defiance of law, a process favoured also by the excessive legislative output in the United States and the variation of law from state to state which suggests the conventional character of law. Further, to secure amendment demands long efforts of a violent and spectacular kind (*y*), injurious to public order and absorbing energies which should be devoted to other ends. Hence in 1937 the by no means unsuccessful effort of the President to secure reform by the reversal of judicial rulings.

#### *The Swiss Confederation.*

The Constitution of Switzerland as settled in 1874 with important later amendments, especially in 1891, is somewhat similar to that of the United States. Side by side with a federal government, whose legislative powers are strictly defined, there exist the local legislatures of the various cantons with undefined legislative powers.

The Federal Government consists of (1) a Federal Executive Council composed of seven members, elected by both Houses of the Federal Legislative Assembly, sitting together in congress, for four years; not more than one member can be chosen from any canton; (2) a Federal Legislative Assembly, consisting of two Houses, viz., the Council of States, composed of two members from each of the twenty-two cantons, and the National Council, composed of 187 members elected by proportional voting for four years by the people in each canton in proportion to their populations, viz., since 1931, one representative for each 22,000 inhabitants. Each canton or half canton has at least one member.

**The Executive.**—The members of the Federal Executive Council must not be members of either House of the Federal Legislative Assembly; and, though they may speak or introduce measures in either House, they may not vote. The President and Vice-President are nominated annually by the two Houses of the Federal Assembly, the President being usually succeeded by the Vice-President. The Federal Council has, in addition to its executive and directing duties, the right to examine treaties made by the cantons with one another or with

(*y*) *E.g.*, the six years' fight for female suffrage (Amendment No. 19, 1920) and the desperate contentions to secure prohibition, and its repeal in Congress in 1933.

foreign countries and to give its approval if it thinks fit. Cantonal power as regards foreign treaties is restricted to those affecting public economy, police, and border relations. Though elected by the Federal Assembly, the members of the Federal Council are not dismissable by that body. In effect, the position of the Federal Council may be compared to that of a board of directors in a joint-stock company, which, though nominally under the control of the shareholders, in practice is never interfered with, except in cases of gross mismanagement.

**The Legislature.**—The Federal legislative power is vested in the two Houses of the Federal Assembly, of which the National Council is the predominant member, though nominally both Houses are on an equal footing as to originating legislative measures. The legislative power of the Federal Assembly is limited to certain defined subjects, which include since 1930 the control of liquor, and under these powers codes of civil and criminal law have been made. The Assembly deals with alliances and treaties with foreign countries, and with cantonal treaties on the application of another canton or the Federal Council.

**The Judiciary.**—The federal judiciary is chosen by the two Houses of the Federal Assembly, and is empowered to decide disputes between the confederation and the cantons, or between cantons, and to try crimes against the confederation and the law of nations. In doing so it may determine the validity of laws made by the various cantons, but not by the federal legislature itself. It has no power to try cases of Federal administrative law, for these are reserved for the Federal Administrative Court.

**The Referendum.**—No alteration of the Constitution can be effected without resorting to the *referendum*; that is to say, the vote of the citizens as a whole must be taken, and the measure cannot be passed unless both a majority of the citizens and a majority of the cantons are in its favour. Any law not including the budget passed by the federal legislature and treaty of more than fifteen years' duration may also be submitted, on the request of 30,000 voters or eight cantons, to the test of the *referendum*, and 50,000 voters may initiate a constitutional amendment (not an ordinary law), though opposed by the legislature to which it must be submitted, and secure its submission to the popular vote (z).

**Differences between the American and Swiss Constitutions.**—It will be seen that the main points of difference between the American and Swiss Constitutions in their federal aspect are:—

- (1) The executive is vested in a President in the United States and a Federal Council in Switzerland.
- (2) In the United States the President is chosen by the Electoral College, composed of elected representatives from each state,

(z) *Bonjour, Real Democracy in Operation*; Brooks, *Government and Politics in Switzerland*, pp. 134 f.

whilst in Switzerland the members of the Federal Council are elected by the Federal Assembly.

- (3) The Upper House or Council of State in Switzerland has not the same weight in the Constitution as the Senate in the United States, since the consent of the latter is necessary before the President can make treaties or appoint public officers.
- (4) Party government, and consequent wire-pulling, exist in an exaggerated form in the United States, whilst in Switzerland it is almost entirely absent. This result, it would seem, follows from the manner in which the executives are appointed in the two countries, as well as from the fact that in the one case the executive is vested in a President, who appoints the various public officers, and in the other case in a council.
- (5) The States in the United States are forbidden absolutely to enter into treaties; the cantons have a limited power.
- (6) The referendum and initiative are freely used for constitutional amendment, and it is much easier to alter the Swiss Constitution than it is to change that of the United States.
- (7) Laws of the federal authority in Switzerland may be submitted on demand to a referendum, but not so in the United States.
- (8) The Swiss federal judiciary cannot rule invalid a federal law, while the United States Supreme Court often decides against federal legislation.

#### *Imperial Federation.*

The example of federal institutions elsewhere inspired in England for many years a movement for imperial federation, which had some sympathy in Dominion circles, but never commanded any wide approval. Formally it was proposed by Sir Joseph Ward for New Zealand at the Imperial Conference of 1911, but was then negated by the United Kingdom and Canada, Australia, and South Africa (a). The dominant motive for the proposal was the desire to secure (1) co-ordination of imperial defence against the menace of German imperialism, and (2) a share of control in the management of the co-ordinated forces.

The war of 1914—18 destroyed any prospect of federalism by demonstrating in the view of the Dominions the possibility of effective co-operation in defence on an autonomous basis, and by creating in the Covenant of the League of Nations a mode of attaining security for smaller nations within the League. Hence interest in defence diminished, compulsory military training ceased in Australia and New Zealand, naval forces were diminished, implication in British guarantees of European peace in the Locarno Pact of 1925 was declined, and complete autonomy in external and internal affairs was achieved (b). The sense of unity remaining is expressed in the co-operation on a voluntary basis in accordance with the recommendations of the Imperial Conference and economic co-operation under the Ottawa

(a) Keith, *Responsible Government in the British Dominions*, iii, 1503 ff.

(b) See Part IX., Chap. II., *post*.

Agreements of 1932 as revised in 1937, which rest on complete autonomy and preservation of all national interests as fundamental. Since the complete failure of the League of Nations in 1935—38 to save Ethiopia from annexation, in complete violation of the League of Nations Covenant (Articles 10 and 16), greater interest in defence has been manifested in all the Dominions, and it was agreed to discuss the issue at the Imperial Conference of 1937, the first formal session since 1930. Moreover, on April 2, 1937, the Union of South Africa Minister of Defence reaffirmed the Union's homologation of the accord of 1921 for the participation by the Union in the defence of the British naval base at Simonstown. The absorption of Austria in March, 1938, by Germany, followed in September, 1938, by the surrender by Britain and France of Czechoslovakia to German control, resulted in the decision of Australia and New Zealand to increase defence expenditure, but on a voluntary basis, while the Union of South Africa accelerated preparations for defence, especially by air, against any attempt by Germany to enforce surrender of German South-West Africa, now a Union mandate.

## CHAPTER III.

THE CHARACTERISTICS OF ENGLISH CONSTITUTIONAL LAW (*continued*).(3) *The Rule of Law.*

ENGLAND enjoys in a marked degree the system of the rule of the law. The principle is doubtless closely connected with the early establishment of central executive and judicial authority in England and of the sovereignty of Parliament. In this way the chaotic confusion of a multitude of local customs was superseded by the introduction by judicial action of the common law and by the activity of Parliament in enacting laws of general application. Equally essential has been the growth of judicial independence, subject to Parliamentary sovereignty. There has been less temptation to strain law against the subject when the executive could obtain all necessary powers from Parliament if need be.

**Absence of Arbitrary Power.**—The idea includes the principles (1) that the executive has no arbitrary power over the subject, and that the latter has under common law or statute certain rights which cannot be invaded by executive action without his having the right to invoke the aid of the courts (a). So much is this so that it has been necessary to confer by legislation special powers on the executive to counter internal disorders, but this is carried out by making formal regulations always subject to Parliamentary control (b). During the war of 1914—18 grave inroads were made on individual liberty, but not by virtue of any mere executive authority; the steps taken were based on the Defence of the Realm Acts.

(2) It includes also the rule that judicial decisions shall be based on fixed principles already established, and clearly expressed, and that punishment by retrospective legislation of acts innocent when performed shall not be permitted. It is totally contrary to the spirit of English law that judges should have power or be required, as in the legal systems of Italy, Germany and the U.S.S.R., to punish actions from the point of view of their incompatibility with the ideals of those unitary state systems. It is in accordance with the spirit that judges should not give a wide interpretation to such offences as sedition, and that overt acts rather than opinions should be punished. It is repugnant to it that judges should have power, as in the Irish Free State, to impose sentences at discretion heavier than those allowed by the ordinary law. It further demands that judicial tribunals shall be made up of trained lawyers imbued with respect for law as such and that they

(a) See Part VIII., Chap. III., *post*.

(b) Emergency Powers Act, 1920 (10 & 11 Geo. V. c. 55).

shall be expected to exercise their functions free from executive pressure and control. The use of military tribunals, therefore, to deal with offences committed by civilians is irreconcilable with the rule of law.

(3) It includes further the rule that legislation must favour the limitation of executive and judicial power to deal arbitrarily with individual rights. Thus, the wide powers of the executive under the Defence of the Realm Acts tended to offend against the ideal of the rule of law as can be seen from Lord Shaw's comments in *R. v. Halliday* (c). Still more intolerable was the power given in the Irish Free State to the executive to declare illegal rival political organisations, to ban meetings, to prohibit the publication of documents, &c. (d).

(4) It includes the rule that the government should jealously respect its legal limitations. Conspicuous recent examples of violation of this rule are (a) the enforcement of sanctions against Italy in 1935—36 by Orders in Council based on a forced interpretation of the Treaty of Peace Act, 1919, and (b) the alterations made without Parliamentary sanction in the form of the Coronation Oath of May 12, 1937. These matters will be discussed later.

(5) It is opposed to interference by the government with the Press, in any form of censorship or desire to influence the newspapers by the practice of giving special information to those papers which are willing to suppress or colour news in the interests of the government. The danger of such action was frankly discussed in the House of Commons on December 7, 1938. The use of the Official Secrets Acts, 1911 and 1920 (e), to control Press statements is widely held to constitute a serious danger to the cause of liberty, and amendment of the latter Act was forced in February, 1939.

From these general characteristics it will be seen that the principles of the rule of law are violated alike by the decision in January, 1939, to intern without trial 34 persons by the Government of Northern Ireland. Such action was held necessary during the Great War, and less excusably after it, as regards Ireland (f), but, when no actual hostilities are being carried on, such action, though fully legal under statute, is indefensible. It would be no less a violation of the rule of law, if a scheme of socialisation of British finance and economy were carried through under an Emergency Powers Act by Orders in Council, the validity of which the courts were forbidden to examine, or which, if declared invalid by the courts, could be validated by a mere resolution of the Commons (g).

Most of the criticism (h) advanced against the idea of the rule of law is based on misunderstanding, or on dislike of the principle which opposes dictatorship of parties of the right or the left. There is, of course, nothing in the rule to prevent the prudent and carefully controlled delegation of legislative and judicial powers to specially

(c) *Zadig*, *Ex parte*, [1917] A. C. 260.

(d) Constitution (Amendment No. 17) Act, 1931, Part IV.

(e) 1 & 2 Geo. V. c. 28; 10 & 11 Geo. V. c. 75.

(f) *R. v. Inspector of Cannon Row Police Station; Brady, Ex parte* (1921), 37 T. L. R. 854.

(g) Jennings, *Parl. Reform*, pp. 114 f.

(h) Jennings, *The Law and the Constitution*, pp. 285 ff.

selected bodies. Such delegation is of long standing in Britain; much of the attack made on it (i) rests on exaggeration and the treatment of remote possibilities as real dangers. The limits of the system will be discussed later; it suffices here to stress that there is nothing essentially inconsistent with the rule of law.

**Equality before the Law.**—The rule of law further involves the general principle of equality before the law in the sense that all persons are subject to the same law, and are subject to the jurisdiction of the same tribunals.

**Exceptions to the Rule.**—There are exceptions to this general rule in part fully justifiable, in part historical accidents:—

- (1) The Crown is a partial exception, for, under the maxim that *the Crown can do no wrong*, it is exempt from criminal prosecutions, and even from a civil action arising in tort (k). Civil actions also against the Crown or its servants for the recovery of real or personal property (except in particular instances where a different remedy is provided by statute, as under the Crown Private Estates Acts, or the Crown Lands Acts) or for sums due under a Crown grant (l) can only be brought by the particular process of Petition of Right (m), which is available also to the subject in cases of debt, or for damages for breach of contract (n); but this remedy is available as of grace and not as of right (o), and it is not available in actions arising out of tort (p). Nor can it be used to recover moneys received by the Crown as reparations from foreign powers for wrongs done to the claimants (q). This prerogative of the Crown, however, forms part of the ordinary common law of the land, and, as such, the extent (r) of the prerogative itself is cogniz-

(i) C. K. Allen, *Bureaucracy Triumphant* (1931); Lord Hewart, *The New Despotism* (1928).

(k) *Tobin v. R.* (1864), 16 C. B. (N.S.) 310. This in effect means that the King is not liable for the acts of his ministers, but ministers are liable for the acts of the King. Cf. *Canterbury v. Att.-Gen.* (1842), 1 Ph. 306.

(l) *Kildare County Council v. R.*, [1909] 2 I. R. 199, 232.

(m) The procedure by Petition of Right is regulated by the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34). No action lies against the Home Secretary for advising that a *fiat* of the Crown to the petition shall not be granted: *Irwin v. Grey* (1867), L. R. 2 H. L. 20. It should not capriciously be refused: *Re Nathan* (1884), 12 Q. B. D. 479; *Bombay and Persia Steam Navigation Co. v. Maclay*, [1920] 3 K. B. at p. 408. A petition cannot be amended so as to go beyond the *fiat* granted: *Badman Bros. v. The King*, [1924] 1 K. B. 64. Nor does it lie if the liability is that of a Dominion: *Att.-Gen. v. Great Southern Ry. of Ireland*, [1925] A. C. 754. For detainee, see *Buckland v. R.*, [1933] 1 K. B. 767.

(n) The damages may be either liquidated or unliquidated: *Thomas v. R.* (1874), L. R. 10 Q. B. 31; *Att.-Gen. v. De Keyser's Royal Hotel*, [1920] A. C. 508.

(o) 23 & 24 Vict. c. 34, s. 2.

(p) *Tobin v. R.*, *supra*.

(q) Cf. *Rustomjee v. The Queen* (1876), 1 Q. B. D. 487; *Baron de Bode's Case* (1846), 8 Q. B. 208; *Civilian War Claimants' Association v. R.*, [1932] A. C. 14.

(r) Thus it has been ruled that save under statute (7 Edw. VII. c. 29, s. 29) the Crown is not bound by a patent: *Feather v. The Queen* (1865), 6 B. & S. 257; that the Crown has a right to dismiss at pleasure: *Dunn v. The Queen*, [1896] 1 Q. B. 116; that it cannot bind itself by contract to fetter future action in matters affecting the public welfare: *Rederiaktiebolaget Amphitrite v. The King*, [1921] 3 K. B. 500; that no engagement as to military or naval services can be enforced in a law Court: *Kynaston v. Att.-Gen.* (1933), 49 T. L. R. 300.

able by the courts (s). One of the most striking examples of immunity is the claim of the Postmaster-General to pay compensation for loss of postal packets merely at his discretion which makes him judge in causes of complaint of theft or carelessness by his staff.

Up to 1933 the Crown neither received costs nor paid them, save in exceptional cases (t). By the Administration of Justice (Miscellaneous Provisions) Act, 1933 (u) costs in civil proceedings, including petitions of right, are placed effectively on the same footing as between subjects. But this is subject to the discretion of the court in cases where the Attorney-General, or a government department, or an officer of the Crown, is required to be made a party, to make an order for payments of costs by any other party. The payment of costs by the Crown is not provided for in cases of proceedings by the Attorney-General on the relation of some other person. In proceedings by the Crown there are certain privileges in respect of informations *in rem* or *in personam* for debt, of arrest by *capias* in claims for customs penalties under the Customs Consolidation Act, 1876 (s. 247), of *subpoena* proceedings in recovery of penalties due to the Inland Revenue, and of the use of the writ of extent to attach land, chattels, or choses in action and even the body.

In certain cases a declaration as to the subject's rights as against the Crown can be obtained by a declaratory action against the Attorney-General, but the limits of this procedure are dubious (x), and it cannot be used to evade the limitations imposed on a petition of right (y). It has been made available for estate duty issues by the Administration of Justice (Miscellaneous Provisions) Act, 1933.

- (2) *Public Officers*.—In *Macbeath v. Haldimand* (z), which arose out of supplies of stores for a fort under the control of the governor of Quebec, it was held that public officers cannot be sued, either personally or in their official capacity, upon contracts made by them in their official capacity; and in such a case the only remedy apparently would be by Petition of Right (a), unless the circumstances of the case make it apparent that they intended to make themselves personally liable (b).

(s) In certain cases a petition is precluded by the Indemnity Act, 1920: *Att.-Gen. v. Royal Mail Steam Packet Co.*, [1922] 2 A. C. 279; *Brookbank, Ltd. v. R.*, [1925] 1 K. B. 52; *Marshall Shipping Co. v. R.* (1925), 41 T. L. R. 285; *Moss Steamship Co. v. Board of Trade*, [1923] 1 K. B. 447.

(t) *Re Carbonit Aktiengesellschaft*, [1924] 2 Ch. (C. A.) 53.

(u) 23 & 24 Geo. V. c. 36, ss. 7, 10.

(x) *Dyson v. Att.-Gen.*, [1912] 1 Ch. (C. A.) 158.

(y) *Bombay and Persia Steam Navigation Co. v. Maclay*, [1920] 3 K. B. 402; *Kynaston v. Att.-Gen.*, *supra*.

(z) (1786), 1 Term Rep. 172; *Unwin v. Wolseley* (1787), 1 Term Rep. 674; and see *O'Grady v. Cardwell* (1872), 20 W. R. 342; *Dunn v. Macdonald*, [1897] 1 Q. B. (C. A.) 555; *Gidley v. Lord Palmerston* (1822), 3 Brod. & B. 275; *Kynaston v. Att.-Gen.* (1933), 49 T. L. R. 300.

(a) See *Palmer v. Hutchinson* (1881), 6 App. Cas. 619.  
(b) *Samuel Bros., Ltd. v. Whetherly*, [1907] 1 K. B. 709, 715; [1908] 1 K. B. (C. A.) 184: volunteer officer held to have pledged his own credit.

This principle applies equally to a Secretary of State as to any other public officer (*c*). The Lords Commissioners of the Admiralty are, however, in certain cases empowered by statute to sue and to be sued (*d*) and other government departments may, on one view, sometimes be sued in their corporate capacity (*e*), and government departments or public officers may be made directly liable in their official capacity by express statutory provisions. There is a certain criminal liability on those in charge of vehicles under s. 121 (2) of the Road Traffic Act, 1930. Thus, by the Ministry of Transport Act, 1919 (s. 26), the Minister may be sued in contract and tort for the acts of his officers, and under the Merchant Shipping Act, 1894 (s. 460) the Board of Trade is responsible for illegal detention of a ship (*f*). But mere incorporation for a limited purpose, *e.g.*, holding land, does not give liability to suit (*g*).

In actions of tort, public officers generally are liable to be sued in their personal or individual capacity, and no malice or want of probable cause need be shown (*h*); though they are not liable in their official capacity, at any rate in cases of trespass (*i*). For action, however, under the Foreign Enlistment Act, 1870 (s. 29) no liability attaches to the Secretary of State or the Governor of a colony. A servant of the Crown in management of some branch of government business is not responsible for defaults of his subordinates, for they are not his servants (*k*). But he may be liable if he has failed to give due directions to his subordinates (*l*).

In certain cases, however, there is departure from the normal rule of liability. No action for slander or libel lies against a civil servant for official communications to another servant

(*c*) See *O'Grady v. Carducell*, *supra*.

(*d*) See *Williams v. Lords Commissioners of the Admiralty* (1851), 12 C. B. 420.

(*e*) See *Graham v. Commissioners of Public Works*, [1901] 2 K. B. 781, *per* Phillimore, J., 790, 791; *Roper v. Commissioners*, [1915] 1 K. B. 45. The authority is dubious.

(*f*) *Thomson v. Farrer* (1882), 9 Q. B. D. 272. For a case of transfer of the shipping controller's liability by statute, see *Marshall Shipping Co. v. Board of Trade*, [1923] 2 K. B. 343, where the controller had obtained money illegally, and it was doubted if the claimant could waive the tort and sue for money had, or must resort to a petition of right. An arbitration award cannot be enforced against the Board: *Grech v. Board of Trade* (1923), 130 L. T. 15.

(*g*) *Gilleghen v. Minister of Health*, [1932] 1 Ch. 86; *Rowland v. Air Council* (1927), 96 L. J. Ch. 470.

(*h*) See *Money v. Leach* (1765), 3 Burr. 1742; *Brassey v. Maclean* (1875), L. R. 6 P. C. 398; *Cobbett v. Grey* (1850), 4 Ex. 729; and see *Entick v. Carrington*, *post*, p. 38; *Madrazo v. Willes* (1820), 3 B. & Ald. 353; *Walker v. Baird*, [1892] A. C. 491; *Johnstone v. Pedlar*, [1921] 2 A. C. 262.

(*i*) *Raleigh v. Goschen*, [1898] 1 Ch. 73; *Macgregor v. Lord Advocate*, [1921] S. C. 847; *Gilleghen v. Minister of Health*, [1932] 1 Ch. 86; *Mackenzie-Kennedy v. Air Council*, [1927] 2 K. B. 517; *Bainbridge v. Postmaster-General*, [1906] 1 K. B. 178.

(*k*) *Lane v. Cotton* (1701), 1 Ld. Raym. 646; *Whitfield v. Ld. Despencer* (1778), 2 Cowp. 754; *Nicholson v. Mounsey* (1812), 15 East, 384 (captain of man-of-war); *Mersey Docks Trustees v. Gibbs* (1864-66), L. R. 1 H. L. 124. So a borough corporation is not liable for wrongful arrest by the police: *Fisher v. Oldham Corpn.*, [1930] 2 K. B. 364. Cf. *Kynaston v. Atli-Gen.* (1933), 49 T. L. R. 300; *Tozeland v. West Ham Guardians*, [1907] 1 K. B. 920; *Stanbury v. Exeter Corpn.*, [1905] 2 K. B. 838.

(*l*) *Mee v. Cruikshank* (1902), 86 L. T. 708.

of the Crown (*m*), nor can an officer be required to give evidence which might be prejudicial to the state (*n*), and documents may be claimed by the head of a department as privileged, though the Court may itself decide such an issue by inspection (*o*).

It must be noted that the protection is not due to the official character of the documents but to the fact that it would be injurious to the interests of the state that they should be disclosed (*p*). Further, it is the practice of the English courts to accept the statement of a minister that production of a particular document would be against the public interest (*q*). But, if a judge has only a general assertion which seems *prima facie* untenable, he may inspect and then allow disclosure (*r*).

- (3) *Judges* are exempt for all acts done in their official capacity, whether maliciously or not (*s*), and this exemption extends to acts done outside their jurisdiction (*t*) in the case of superior judges absolutely; in the case of judges of inferior courts unless they have the knowledge or means of knowledge that the act complained of was outside their jurisdiction (*u*). Parties (*x*), counsel (*y*), and witnesses (*z*) share judicial immunity in respect of words spoken in judicial proceedings, and juries as regards their verdicts (*a*).
- (4) *Justices of the Peace* are not protected to the same extent as judges, and by Jervis' Act (*b*) an action lies against them for wrongful acts done maliciously or without reasonable and probable cause within their jurisdiction (*c*), or for acts done outside their jurisdiction without any such limitation (*d*). But no

(*m*) *Chatterton v. Secretary of State for India*, [1895] 2 Q. B. 189; *Burr v. Smith*, [1909] 2 K. B. 306; *M. Isaacs & Sons v. Cook*, [1925] 2 K. B. 391.

(*n*) *West v. West* (1911), 27 T. L. R. 476; *Irwin v. Grey* (1862), 3 F. & F. 635. A Secretary of State need not give evidence under the Foreign Enlistment Act, 1870, s. 29.

(*o*) *Cf. Carmichael v. Scottish Co-operative Wholesale Society, Ltd.* (1934), Sc. L. T. 158, where Lord Wark decided on inspecting for himself the report and notebook of a deceased policeman in an accident case, overruling the general objection of the Secretary of State.

(*p*) *Asiatic Petroleum Co., Ltd. v. Anglo-Persian Oil Co., Ltd.*, [1916] 1 K. B. 822.

(*q*) *Ankin v. L. N. E. R. Co.*, [1930] 1 K. B. 627; *Att.-Gen. v. Nottingham Corpn.*, [1904] 1 Ch. 673; *Hennessy v. Wright* (1888), 21 Q. B. D. 509; *Williams v. Star Newspaper Co., Ltd.* (1908), 24 T. L. R. 297.

(*r*) *Spiegelmann v. Hocker* (1933), 50 T. L. R. 87; *Robinson v. State of South Australia* (No. 2), [1931] A. C. 704; *Marconi's Wireless Tel. Co. The Commonwealth* (No. 2), 16 Commonwealth L. R. 174.

(*s*) *Hamond v. Howell* (29 Car. II.), 2 Mod. 219; *Anderson v. Gorrie*, [1895] 1 Q. B. 670; *Haggard v. Pelicier Frères*, [1892] A. C. 61, 68; *Fray v. Blackburn* (1863), 3 B. & S. 576, 578; *Scott v. Stansfield* (1868), L. R. 3 Ex. 220; *Kemp v. Neville* (1861), 16 C. B. (n. s.) 523. *Cf. Ferguson v. Kinnoull* (1842), 9 Cl. & F. 251, 311. There is an exception in the case of refusal of *habeas corpus*: 31 Car. II. c. 2, s. 10. The Star Chamber claimed power to punish corrupt judges, *e.g.*, 1633, Rushworth, ii, 203.

(*t*) *Houlden v. Smith* (1850), 14 Q. B. 850. The point is disputed.

(*u*) *Culder v. Halket* (1839), 3 Moo. P. C. 28.

(*x*) *Astley v. Younge* (1759), 2 Burr. 807.

(*y*) *Munster v. Lamb* (1883), 11 Q. B. D. 588.

(*z*) *Seaman v. Netherclift* (1876), 2 C. P. D. 53.

(*a*) *Bushell's Case* (1670), 6 St. Tr. 999.

(*c*) 11 & 12 Vict. c. 44, s. 1.

(*b*) 11 & 12 Vict. c. 44.

(*d*) *Ib.* s. 2.

proceedings lie for action under a conviction or order until it has been set aside, nor for defamation (e).

At common law acts done by *constables* under warrants issued with jurisdiction are protected but not if no jurisdiction exists (f) and its non-existence is patent. By statute (g) they have further protection, but, if they fail even on what seems unimportant detail in exactitude of procedure, they are liable (h). In all cases, however, for acts done in their official capacity, justices of the peace, and in certain cases mayors, constables, and certain other officials (i), are subject to certain special procedure by the same Act, which provides that the action must be commenced within six months of the offence (k).

- (5) It is provided more generally by the Public Authorities Protection Act, 1893, that actions against public officers in respect of acts done, or neglects or defaults, in the execution of Acts of Parliament, or of any public duty or authority, must be commenced within six months of the act or default, or, in the case of continuing injury or damage, within six months after the ceasing thereof (l). If the defendant succeeds he obtains costs as between solicitor and client, and he may plead tender of amends, and, if the damages awarded do not exceed that sum, is entitled to costs from date of tender. A strong objection to the limitation of time has been raised, and a promise of consideration has been given in respect of the Limitation Bill, a year minimum being suggested, which is also suggested for claims against school authorities in respect of injuries to children.

Specific safeguards are accorded also to customs and excise officers (m), and to doctors who certify persons as insane (n).

(e) *Law v. Llewellyn*, [1906] 1 K. B. 487. This case, which deals with judicial action, is not inconsistent with 11 & 12 Vict. c. 44, s. 1.

(f) *The Case of the Marshalsea* (1613), 10 Co. Rep. 76 a.

(g) The Constables' Protection Act, 1751 (24 Geo. II. c. 44), makes a warrant authority, the magistrate remaining liable: *Price v. Messenger* (1800), 2 B. & P. at p. 161; Criminal Justice Act, 1925 (15 & 16 Geo. V. c. 86), s. 44.

(h) *Horsfield v. Brown*, [1932] 1 K. B. 355.

(i) S. 18.

(k) S. 8.

(l) 56 & 57 Vict. c. 61, s. 1; *The Danube*, [1921] P. 183; *Newall v. Starkie* (1920), 89 L. J. P. C. 1; *Amour v. Scottish Milk Marketing Board* (1938), Sc. L. T. 347; *McManus v. Bowes* (1937), 53 T. L. R. 844 (lunacy authority); *Paul v. Wheat Commission*, [1937] A. C. 139. The action must be done under duty: *The Ronald West*, [1937] P. 212; *Hawkes v. Torquay Corpn.* (1938), 61 Ll. L. Rep. 289. But the managers of a non-provided school are protected: *Greenwood v. Atherton* (1938), 55 T. L. R. 222. For difficulties of this limit, see *Freeborn v. Leeming*, [1926] 1 K. B. 160; *Copper Export Assocn. v. Mersey Docks* (1932), 48 T. L. R. 542. The Act does not apply to specific contracts or actions for recovery of land: *Bradford Corpn. v. Myers*, [1916] 1 A. C. 242; *Scammell and Nephew v. Hurley*, [1929] 1 K. B. 419. It does apply to a *quia timet* action: *Graigola Merthyr Co. v. Swansea Corpn.*, [1929] A. C. 344. It is applicable against an infant: *Shaw v. London County Council*, [1935] 1 K. B. 67. The limit is not applicable to *certiorari* proceedings: *R. v. London County Council*; *Swan & Edgar, Ex parte* (1929), 45 T. L. R. 512.

(m) 39 & 40 Vict. c. 36, s. 261; 53 & 54 Vict. c. 21, s. 29.

(n) 53 & 54 Vict. c. 5, s. 330; *Harnett v. Bond and Adam*, [1925] A. C. 669. The exemption is extended by 20 & 21 Geo. V. c. 23, s. 16. There is, it is clear, far too little safeguard against careless or malicious certification, and much wrong is probably thus inflicted. But Parliament has refused to act.

- (6) The trial by peers of *peers* is a historical survival, now indefensible, as a grave cause of waste of judicial time and money, as undemocratic and unjust, and as tending to the differential treatment of criminal acts. The failure in 1936 to abolish the anomaly illustrates the extent to which personal privilege can still be defended in a democracy (o).

**Scope of the Rule.**—Apart from these exceptions, however, the law is, in general, the same for all. A minister of the Crown cannot plead the orders of the Crown as an exemption from liability for an illegal act (p), and since the Bill of Rights (1689) the Crown can no longer dispense with the provisions of Acts of Parliament in favour of individuals. Moreover, since the Act of Settlement (1701) a pardon by the Crown is no longer a bar to an impeachment in the Commons (q).

The English standpoint is clearly seen in the case of *Entick v. Carrington* (r), which was an action against the King's messenger for seizing the plaintiff's papers under the warrant of a Secretary of State, the plaintiff being suspected of being the author of a seditious libel. It was held that the warrant was illegal, and Lord Camden, C.J., said in the course of his judgment: "With respect to the argument of State necessity, or a distinction that has been aimed at between State offences and others, the common law does not understand that kind of reasoning, nor do our books take any notice of such distinction." Not less striking is the case of *O'Brien*, who was arrested and deported to the Irish Free State under a regulation under the Restoration of Order in Ireland Act, 1920. The deportation was believed regular and necessary in the public interest by the law officers and the Government, but on *habeas corpus* the prisoner was released (s), and he and others were indeed prevented from actions against those who arrested and detained them only by means of an indemnity Act (t), which granted them compensation; it seems, however, that it was originally intended not to compensate, which the Commons refused to accept. Again, a soldier or a policeman cannot plead the orders of his superior officer; they are liable equally with ordinary citizens to be sued for illegal acts, and triable by the same tribunals (u). A soldier, indeed, is in a less favourable position than the ordinary citizen, for, while he remains subject civilly to all the liabilities of the ordinary subject, he is subject to further liabilities under military law, and he must run the risk either of rendering himself liable to prosecution before a civil tribunal by

(o) Trial of Peers (Abolition of Privilege) Bill, 1936, promoted by Lord Sankey as the outcome of the trial of Lord de Clifford (December 12, 1935): H. L. Pap. 1935—36, No. 12.

(p) *Danby's Case* (1679), 11 St. Tr. 599.

(q) 12 & 13 Will. III. c. 2, s. 3.

(r) (1765), 19 St. Tr. 1067. The view that *Elia v. Pasmore*, [1934] 2 K. B. 164, seriously affects this judgment must be held to go too far: H. J. Laski, *Parl. Govt.*, p. 366. There is, after all, nothing meritorious in sedition.

(s) *Ex parte O'Brien*, [1923] 2 K. B. 361; *Home Secretary v. O'Brien*, [1923] A. C. 603.

(t) Restoration of Order in Ireland (Indemnity) Act, 1923 (13 & 14 Geo. V. c. 12).

(u) Though he may be sued in all cases for illegal acts, the subordinate will not be held criminally liable unless the commands of his superiors were clearly and manifestly illegal. In other cases the superior and not the subordinate is liable. See *Keighly v. Bell* (1866), 4 F. & F., p. 790. Cf. Part V., Chap. II., *post*.

obeying the orders of his superior officers if such orders are clearly and manifestly illegal, or, on the other hand, of committing a military offence and rendering himself liable to be punished by court martial for disobedience to the commands of his superior.

**Acts of State.**—Certain matters, however, lie outside the normal sphere of law. In the technical sense an act of state denotes (1) an action, committed against an alien on land or sea outside British territory, authorised or adopted by the Crown, whose legality the courts cannot investigate, as when a British officer destroys property of a slave holder (*x*); (2) the annexation, on conquest or otherwise, or occupation of foreign territory, by order of the Crown; issues arising thence, whether affecting British subjects or aliens, are not justiciable so far as concerns claims against the Crown or its officers, whether these claims concern actions done by officers in carrying out annexation or are based on contracts or torts, liability in respect to which is alleged against the dispossessed state (*y*); (3) an action done on British territory in time of war against an enemy alien, *e.g.*, killing or wounding, as part of repelling invasion, or the imprisonment of such enemies, who cannot claim release on *habeas corpus* (*z*). A friendly alien cannot be met by such a plea, unless perhaps the Crown has withdrawn its protection formally because of his treasonable activities (*a*). It is equally true, of course, that acts of war committed by aliens on British soil, if authorised or ratified by their sovereigns, cannot be treated as crimes (*b*). (4) Treaties normally do not confer rights or obligations, apart from legislation applying their terms. Thus the subject is not entitled to claim by petition of right compensation granted under treaty for persons injured (*c*). But treaties or acts of recognition of states or governments may have important results even as regards private persons, *e.g.*, by excluding the use of legal process against property of the state (*d*) or validating the confiscation by the state of property within its territory (*e*).

(*x*) *Buron v. Denman* (1848), 2 Ex. 167. Contrast *Walker v. Baird*, [1892] A. C. 491; *Musgrave v. Pulido* (1879), 5 App. Cas. 102; in the former case the action taken was on British territory and against a subject; in the latter against an alien.

(*y*) *Nabob of the Carnatic v. East India Co.* (1792), 2 Ves. Jr. 56; *Secretary of State for India v. Kamachee Boye Sahaba* (1859), 13 Moo. P. C. 22; *Ex-Rajah of Coorg v. East India Co.* (1860), 29 Beav. 300; *Salaman v. Secretary of State for India*, [1906] 1 K. B. 613; *Cook v. Sprigg*, [1899] A. C. 572; *West Rand Central Gold Mining Co. v. R.*, [1905] 2 K. B. 391; Keith, *State Succession*, ch. iii.

(*z*) *Three Spanish Sailors' Case* (1779), 2 W. Bl. 1324; Dicey and Keith, *Conflict of Laws* (5th ed.), p. 215; *R. v. Knockaloe Camp Commandant*; *Forman, Ex parte* (1917), 34 T. L. R. 4.

(*a*) *Johnstone v. Pedlar*, [1921] 2 A. C. 262; cf. *Porter v. Freudenberg*, [1915] 1 K. B. 857, 869.

(*b*) Cf. *Dobree v. Napier* (1836), 2 Bing. N. C. 781: even a British subject is not liable to suit if in the service—albeit illegally—of a foreign sovereign he captures a British vessel breaking a blockade; *Carr v. Francis Times & Co.*, [1902] A. C. 176: interference with a British ship in foreign territorial waters. It was held in *R. v. Lesley* (1860), Bell C. C. 220, that the conveyance outside territorial waters of Chileans banished thence to England in a British ship was illegal under contract; had the service been involuntary, the result would presumably be different: cf. *Att.-Gen. for Canada v. Cain*, [1906] A. C. 542.

(*c*) *Civilian War Claimants' Association v. R.*, [1932] A. C. 14.

(*d*) *The Arantazuri Mendi* (1938), 55 T. L. R. 454; *The Abodi Mendi* (1938), *ib.* 451.

(*e*) *Aksionairnoye Obschestvo A. M. Luther v. Sagor & Co.*, [1921] 3 K. B. (C. A.) 532; *Haile Selassie v. Cable and Wireless, Ltd.* (1938), 55 T. L. R. 209.

**Droit Administratif.**—This characteristic feature of English law has led to the saying that there exists in England no such thing as *droit administratif*, which obtains in certain countries, and more especially in France (f). In that country in its earliest form the system of rendering claims against officials justiciable only by special courts, comprising a large proportion of officials, was no doubt worked in the interests of official immunity, and the ordinary courts suffered in prestige and power. It has, however, since the law of August 11, 1872, developed into a very elaborate scheme which affords the citizen a remarkably complete legal protection under the ægis of the Council of State, a body marked by administrative experience and judicial independence, against illegalities of all kinds and even the unfair employment of official authority, such as orders of municipalities or of administrative bodies, whether in the financial interests of the administrative authority or in unfair discrimination against certain classes of citizens. For personal torts the officer remains subject to the ordinary courts, but occasionally compensation in respect of such action can be awarded. The system necessarily involves an impartial tribunal to settle issues of conflicting jurisdiction. This function is performed by the *Tribunal des Conflits*, composed of an equal number of officials and of the ordinary civil judiciary. It is presided over by the Minister of Justice who normally intervenes only if there is an equality of votes. Certain high acts of government of course, are exempt from any judicial investigation. In other countries a like system operates, as in Germany and Belgium, but seldom with the completeness or satisfactory character of the French system.

In England the doctrine put forward under the Tudors and Stuarts of excluding the prerogative from the cognizance of the courts, the writ *de non procedendo rege inconsulto* (g), and the Council's jurisdiction, form the nearest approach to such a system which history affords. At the present day the only instances at all analogous are the cases in which government servants are subject to the special methods of procedure referred to above (h). There is no general principle that an official breach of trust is a crime, and, although the Official Secrets Acts, 1911 and 1920, provide that certain acts of officials shall be misdemeanours, it is possible that derelictions of duty by public servants, which in other countries would be severely punished, may still in England expose the wrongdoer to no legal punishment (i).

Much more important is the recent development under which many issues of economic and social character arising out of the extension of state activities to town planning, housing, health insurance, unemployment, and so on are dealt with by special tribunals, some of which are essentially judicial, others really administrative (k). But the report of the Committee on Ministers' Powers emphatically rejected the view that these cases present a real parallel to *droit administratif* and the

(f) Cf. Finer, *Modern Government*, ii, 1074—1093. This, of course, is only one aspect of administrative law; see p. 1, *ante*. In France, it covers the relations *inter se* and with the public of governmental administrative bodies.

(g) *Case of Commendams* (1616), Bacon's *Letters and Life* (ed. Spedding), v, 357—369; Holdsworth, v, 439 ff.

(h) See *ante*, pp. 34 ff.

(k) See Part III., Chap. IV., *post*.

(i) See Part VIII., Chap. III., *post*.

suggestion that a system analogous to that of France should be introduced (*l*).

**Case Law as Basis of Rights.**—One further aspect of the rule of law is specially characteristic of the constitution, the fact that certain of the most important principles affecting the rights of the subject are merely deductions from case law and have no statutory authority. Continental practice pays far less attention to case law and enunciates principles, to be applied by the courts, in constitutional codes. In practice the English procedure has advantages, because it secures that remedies exist. Continental law may assert rights, but courts may not have the means to make them effective. On the other hand, judicial decisions denying rights, such as that on impositions (*m*) or ship-money (*n*), have served useful ends in eliciting statutory declarations of essential rights. Among the many instances of cases establishing important principles are those of *Floyd v. Barker* (*o*), negating liability of juries to suitors injured by their verdicts; of *Bushell* (*p*), denying the legality of punishing juries by fines; of *Howell* (*q*), asserting judicial immunity; of *Bowles* (*r*) denying the right to levy income tax on a resolution of the House of Commons; of *De Keyser's Royal Hotel* (*s*), explaining the relation of statute and prerogative, &c.

(*l*) Parl. Paper, Cmd. 4060, p. 110.

(*m*) *Bates' Case* (1606), 2 St. Tr. 371.

(*n*) *R. v. Hampden* (1637), 3 St. Tr. 825. The judgment was declared wrong and reversed by 16 Car. I, c. 14.

(*o*) (5 Jac. I.), 12 Co. Rep. 23.

(*p*) (1670), 6 St. Tr. 999.

(*q*) (1678), 2 Mod. 219. See, further, Part III., Chap. IV., *post*.

(*r*) [1913] 1 Ch. 57.

(*s*) [1920] A. C. 508.

## PART II.

### The Legislature.

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#### CHAPTER I.

##### THE MEETING AND TERMINATION OF PARLIAMENT.

THE Government of England, using that term conveniently in its widest sense, consists of the legislature, the executive, and the judiciary, with functions to some extent overlapping, and these will now be considered in their order. It must be remembered that the legislature and the executive act also for Scotland, and in a much less degree for Northern Ireland.

**Composition of the Legislature.**—The legislature consists historically of the King in Council in Parliament: the three parties necessary to legislation being: (1) the Crown, (2) the Lords Spiritual and Temporal, and (3) the Commons. So the enacting clause at the commencement of each Act of Parliament runs: “Be it enacted by the King’s most excellent Majesty, by and with the advice of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same as follows.” The present title of Parliament is “The Parliament of the United Kingdom of Great Britain and Northern Ireland” (a). England and Scotland were united in 1707, Ireland with Great Britain in 1801, but part of Ireland was lost in 1921.

**The Origin of Parliament.**—The origin of Parliament, as its name indicates, lies in the need of the Crown to discuss issues with the leading men of the country. The Crown is the head, the first and last of Parliament; the estate of the Crown alone is essential to Parliament, but, if the King refuses his presence, as did Richard II. in 1386, the other estates may take action effectively and justifiably as representing the community (b). Normally all co-operate, as a result of a long development.

It has been attempted (c) to fix definitely the creation of Parliament in Edward I.’s reign by the assumption that under him came to be united two different elements: (1) the King in Council in Parliament, i.e., the King, his sworn Council, and the judges, whose essential

(a) 17 & 18 Geo. V. c. 4. “United Kingdom,” unless the context otherwise requires, means Great Britain and Northern Ireland: *ibid.*

(b) Cf. the deposition of Richard II.: Lapsley, E. H. R. xlix, 423 ff., 577 ff. The issue arose under Charles I. and James II.; Clarke, *Medieval Representation and Consent*, p. 319.

(c) A. F. Pollard, *Evolution of Parliament*, pp. 47 ff.

business was to deal with the pleas and petitions; the grant of these very often was essentially legislation akin to that later known as private bill legislation; (2) the discussions of the King with his magnates, which are called equally Parliament though also *colloquium*. But it is clear that, if we accept this view, the fusion cannot be ascribed to Edward I. Under Henry III. we have the term Parliament applied in 1258 to the assembly of magnates at Oxford, and clergy, barons, knights and citizens were summoned to Parliament at London in 1265 (*d*).

The view, however, that Parliament had primarily (*e*) judicial functions and that Council and Parliament were identic at first and that later the Council was reinforced has been effectively attacked (*f*). Parliament rather had its origin in the treating of the King and the nation, those representing the *universitas regni*, regarding the *negotia regis et regni*; for this reason it became usual and necessary to summons the Commons also. Edward I. seems to have regarded discussion of public affairs as the real object of Parliament, and to have felt the petitions which came in for redress of private wrongs rather a hindrance to business. Only in Edward II.'s reign do we find in the Ordinances of 1311 recognition of judicial functions as a part of the essential work of Parliament. Judicial business was often dealt with therein, but by the King in Council at his Parliament, not by Parliament. Under the same monarch the presence of the Commons becomes essential in assemblies to which the Chancery clerks in the records give the style of Parliament. This view (*g*), which distinguishes Parliament and the Council, has strong claims to respect.

Moreover, an essential function of Parliament was closely concerned with advice. The King needed money if any great business were afoot. He had indeed danegeld, a tax on land, but that disappeared after 1162; tallage, an arbitrary levy on royal demesne, but it was last effectively raised in 1304, and the right to regulate trade by customs duties was reduced in 1275. More and more, therefore, must the Crown look to co-operation and free grants.

But, if it is wise to secure co-operation, those who co-operate will expect to have their grievances as presented in petitions granted. Petitions from groups of the Commons are followed by petitions from

(*d*) Jolliffe, *Medieval England*, pp. 342 ff.

(*e*) Pasquet, *Essay on the Origin of the House of Commons*, pp. 197—230. He rejects Stubbs's view that Edward I. seriously believed in the tag *quod omnes tangit ab omnibus approbetur* (Sel. Chart. p. 480) used in his writ to the prelates in 1295. But he evidently was convinced of the necessity of representation for consent to taxation; out of sixteen occasions of summons of the Commons, only on three (1283, 1298 and 1307) was no demand made for grants: Clarke, *op. cit.* p. 315. Moreover, the maxim (Justinian, Code V., tit. 59, 5, cap. 3) had wide ecclesiastical currency: Vinogradoff, *Collected Papers*, ii, 245. Riess (*Hist. Zeitschrift*, 1888, pp. 1 ff.) stresses as the motives of Edward I.'s action: (1) the desire to supervise the administration of the sheriffs; (2) to use the knights to collect aids, to bring petitions and to transmit the Council's replies to those concerned.

(*f*) B. Wilkinson, *Const. Hist. of 13th and 14th Centuries*, pp. 15 ff.

(*g*) Crimes, *Engl. Const. Ideas in Fifteenth Century*, pp. 70 ff., follows the judicial theory, but admits that Parliament is not called a Court early; in 1384 the name is used: *Rot. Parl.* iii, 169.

the whole, and later petitions by Lords and Commons with royal assent give us legislation.

The composition of Parliament was first tentatively marked out by King John in Magna Carta (1215), when he promised not to levy scutages or aids other than the three recognised feudal aids, except with the common counsel of the realm, as ascertained by summoning an assembly which was to consist of archbishops, bishops, abbots, earls, and greater barons, who were to be summoned individually by writ, and the tenants in chief, who were to be summoned by general writs addressed to the sheriffs. The gathering is feudal, but the distinction of mode of summons points to a definite line of distinction between the greater and lesser tenants in chief; it may well have been that it was not expected that more than representatives of the lesser tenants would appear. Representation for legal purposes was known since the Domesday survey and the jury system of Henry II (*h*); four knights were not rarely summoned to bring a record of a county court judgment on appeal of false judgment before the court of the king; and knights elected in the county court collected the carucage of 1220.

Moreover, the idea developed that the magnates present could bind the absent of their numbers, and further that the magnates of the Council could bind the sub-tenants of the tenants in chief; the royal authority was used to make direct collection of the aids, assessed by local juries or royal officers (*i*). But the idea that sub-tenants and lesser tenants in chief should be represented by their own nominees won support from an important development in the Church. In 1226 the King with the licence of the Pope demanded a clerical subsidy; at the initiative of the chapter of the diocese of Salisbury the Archbishop summoned to a convocation at St. Paul's the bishops, abbots, priors, and archdeacons of the province and proctors representing collegiate and cathedral chapters; by this assembly a grant was authorised (*k*). The idea of proctorial representation was probably suggested by the practice of the monastic orders; in the third decade of the 13th century the Dominicans made the representative principle the keystone of their constitution. At Innocent III.'s Lateran Council in 1215 the chapters in each diocese were invited to be represented. When in 1179 the Lateran Council forbade the bishop to tax his clergy without their consent the archdeacons at first represented the views of the latter, regularly from 1226. But as early as 1240 the legate Otto virtually admits that proctors of chapters must be consulted. In 1254 for the first time they were summoned by their bishop by royal order to meet to grant an aid, discreet men to be sent from each diocese to report to the Council. The replies given were unfavourable. The position of the proctors was consolidated by 1283 when Archbishop Peckham summoned the archdeacons, two proctors from each diocese, and one from each chapter in a model convocation; that of York was fixed about the same date, two proctors coming from each archdeaconry.

(*h*) Maitland, *Const. Hist.*, pp. 70—75; for John's use in 1213, *Sel. Chart.*, pp. 271, 281.

(*i*) Mitchell, *Studies in Taxation under John and Henry III.*, pp. 383 ff.

(*k*) Powicke, *Stephen Langton*, pp. 157 ff.

Lay representation was rather slower in taking definite shape, and was probably evoked by the refusal of the magnates from 1237 to 1269 to grant supply, thus inducing appeal to the tenants other than the great tenants in chief. These appeals involved the association of consent with representation; those elected were to bring a mandate, not merely to report, as under John.

Shire representation occurred first in 1254 (*l*), when, to grant an aid, two knights were summoned from each shire. In 1261, 1264 and 1265 knights were summoned for political discussions with the King, and in Simon de Montfort's Parliament of 1265 we find the first example of distinct representation for shires, cities, and boroughs. This was induced by the desire to secure popular support against the king and the magnates, direct summons being sent to select cities, etc. The method of representation was closely followed by Edward I. in 1275, when four knights and four to six burgesses were summoned through the sheriffs. Further definition was attained in 1295, when the sheriffs were directed to cause to be elected two knights of each shire, two citizens of each city, and two burgesses of each borough (*m*). To this Parliament seven earls and forty-one barons were summoned by special writ, whilst the writ to the archbishops and bishops now contained the *præmunientes* clause, directing the attendance of the representatives of the chapters and of the parochial clergy. Thus we have the germ of the idea of three estates of the realm: the clergy, the baronage, and the commons (*n*).

At the same time we find the definite form of the summons. Knights and burgesses must have full and sufficient power for themselves and the community to do what should be determined by common counsel (*o*). They must therefore be able to exercise independent judgment and co-operation with others, though still in subordinate partnership with the Crown. Edward I. clearly had come to admit, as he did formally (*p*), in the *Confirmatio Cartarum* (1297), that he could enjoy a share in his subjects' goods only with the common assent of all the realm and for the common profit thereof. This motive alone explains the *præmunientes* clause: the King desired the bounty of the clergy. The

(*l*) See Stubbs, *Const. Hist.*, ii, 221. They were to be elected in the County Court and not merely by knights or tenants in chief: *Sel. Chart.*, p. 365. The term "Parliament" is found, used of the general assembly of the barons in 1246, in Matthew Paris; in 1242 in Close Rolls, 1237—1242, p. 447; in 1275 in *Stat. Realm*, i. 26.

(*m*) Stubbs, *Const. Hist.* ii, 223. For 1275, see *Sel. Chart.*, p. 441; Pasquet, *H. of Commons*, pp. 74—80; for 1295, pp. 98—102.

(*n*) The tendency originally was in favour of separate discussions between the various classes of representatives: *Rot. Parl.* ii, 52, 66 (1332); though joint deliberation appears, e.g., 1315 at Lincoln; *ib.* i, 351. The tendency steadily grew from 1332 of separate deliberation of the Commons who report to King and magnates: Wilkinson, *Const. Hist. of 13th and 14th Centuries*, pp. 101, 102. Thus, the *Modus tenendi Parliamentum*—possibly temp. Edward II.—contemplates separate meetings of the four orders of the clergy, and in the Convocation at St. Paul's in 1370 the religious and the clerical proctors debated apart. See Clarke, *Medieval Representation and Consent*, ch. xiv, commenting on Pollard, *Evolution of Parliament*, ch. iv.

(*o*) B. Wilkinson, *Const. Hist. of 13th and 14th Centuries*, pp. 36 ff., insists that the formula adopted from 1295 on in no way reduced the status of the Commons, as often held.

(*p*) Wilkinson, *op. cit.*, pp. 55—81, argues that the constitutional issue was never in doubt.

necessity of the consent of the Commons to legislation was slower in achieving recognition. They were long regarded as extra-Parliamentary, but the Statute of York in 1322 seems to provide that matters for the estate of the King and the estate of the realm and the people shall be treated, accorded, and established in Parliaments by the King and by assent of the prelates, earls and barons, and the commonalty of the realm (*q*). This probably does not refer to fundamental laws only, as so often asserted with mere ingenuity than certainty, but is general in application (*r*). The Commons also were included in the deputation of the estates to Edward II. at Kenilworth to force abdication (*s*).

In the impeachment of Latimer in 1376 we find not the identity (*t*) of Council and Lords but rather clear indications of their diversity; the judges in the impeachment seem to be the Lords while the Council is in the background (*u*).

But the modern Parliament was only created when (1) the baronage became entitled to writs of summons; (2) the knights joined with the burgesses in one house, a process beginning in 1332 (*x*) and soon regular; and (3) the lower clergy ceased to attend Parliament; their proctors cannot be shown to have attended after 1332. The King found it easier to secure grants from the clergy in their Convocations, but Parliament lost by their absence a counterweight to the formalism of the lawyers. Further, it must be noted that the Council, originally an essential part of Parliament, became, even under Edward III., and markedly under Richard II., differentiated, so that the barons and higher clergy (the magnates) became the House of Lords and only a few councillors, not being magnates, but justices and their associates, were summoned to advise, not to vote.

The *præmunientes* clause is still inserted in the writs addressed to the archbishops and bishops, but the clergy ceased to attend before the end of the fourteenth century, preferring to meet in their own convocations, where they taxed themselves. In 1663 by a tacit understanding (*y*) the clergy gave up the right to tax themselves and were included in the general scheme of taxation; in return for this they assumed the right to vote for the return of knights of the shire as freeholders of their glebes, and this right they have continued to exercise ever since, though without any direct statutory authority (*z*); it was challenged as late as 1696.

### *The Meeting of Parliament.*

**The Summons**—Upon the dissolution of an existing Parliament, which can take place either by direct exercise of the Crown's preroga-

(*q*) Statutes of the Realm, i, 189; Clarke, ch. viii.

(*r*) Wilkinson, pp. 52 f. Contrast Lapsley, E. H. R., xxviii, 118 ff; Pollard, Evolution of Parliament, p. 241; Chrimes, Eng. Const. Ideas in Fifteenth Century, pp. 92 f.

(*s*) Clarke, pp. 185 ff.

(*t*) Wilkinson, pp. 82 ff.

(*u*) *Ib.* pp. 99 ff., stresses the growth of the Commons and Lords as against Council.

(*x*) *Rot. Parl.* ii, 127, is proof for 1341. The commutation of the grant of the tenth and the fifteenth for £38,000 in 1332 made separate consultation needless.

(*y*) See 15 Car. II. c. 10; 16 & 17 Car. II, c. 1, s. 36; Parl. Hist. iv. 310; Hallam, Const. Hist., iii, 243 ff.

(*z*) The right of the clergy to vote had, however, been assumed by statute to exist: see 10 Anne, c. 31; 18 Geo. II. c. 18.

tive, or by effluxion of time, the Crown (*a*) by virtue of the prerogative summons a new Parliament by proclamation. With regard to statutory authorities ensuring the regular summons and session of Parliament, an old statute of the reign of Edward III. (*b*) enacts that "a Parliament shall be holden every year once, and more if need be"; this enactment, however, was more often disregarded than observed, and many years frequently elapsed between the meetings of Parliament. More recent enactments are the 16 Car. II. c. 1, which provides that "the sitting and holding of Parliament shall not be intermitted or discontinued above three years at the most," defied by Charles himself, and repealed in 1887 as unnecessary, and the Triennial Act, 1694 (6 Will. & M. c. 2), which directs that the writs for the summons of a new Parliament shall be issued within three years of the dissolution of the preceding Parliament. The principal security, however, at the present day for the regular summons of Parliament does not rest so much upon statutory authority as legally upon the necessity for passing the Army and Air Force (Annual) and the Finance and Appropriation Acts, without which the government of the country could not legally be carried on, and practically on the public expectation of its sessions, for the country always regards the sitting of the Commons as a safeguard for the welfare of the country.

The dissolution of one Parliament and the calling of another in its place are now usually announced by proclamation under the Great Seal issued by the Crown on the advice of the Privy Council. The proclamation announces at the same time an Order in Council directing the Lord Chancellor (in the case of Northern Ireland the Governor (*c*)) to cause the necessary writs to be issued. It is no longer the custom to issue a sign manual warrant to the Chancellor to issue the writs. Writs under the Great Seal are accordingly issued by the Crown Office to the following persons:—

- (a) The spiritual peers.
- (b) The temporal peers.
- (c) The representative Irish peers.
- (d) The judges, the attorney and solicitor-general, and the king's ancient serjeant (when that office is filled—now no longer the case).
- (e) The returning officers for the election of members of the House of Commons, who are the sheriffs of counties, the mayors of boroughs, and chairmen of urban district councils (*d*).

The spiritual peers are summoned "on their faith and love," the temporal peers "on their faith and allegiance."

(a) Exceptions have only occurred at periods of revolution, in 1399, 1660 and 1688, or on a minor's accession as in 1422.

(b) 4 Edw. III. c. 14; 36 Edw. III. st. 1, c. 10. The intention was to have a Parliament newly elected yearly. Repealed in 1863.

(c) Formerly the Lord Chancellor of Ireland, an office abolished by 13 Geo. V. sess. 2, c. 2, s. 2, sch. 2, pt. ii.

(d) For the cessation of sending all writs to the sheriffs, see Parliamentary Elections Act, 1853 (16 & 17 Vict. c. 68), s. 1. The duties of returning officers are normally done by the registration officers, under 7 & 8 Geo. V., c. 64, s. 30.

The judges and the law officers are summoned in a subordinate capacity to attend "with us and the rest of our council to treat and give your advice"; these writs are, since the Judicature Acts, issued to the Lords Justices of Appeal, but not to those of the judges who are entitled to be summoned as temporal peers, nor do the judges in fact attend save on special summons. They were formerly often consulted on legal issues, and in 1897 even the Lords Justices of Appeal were invited to aid the Lords in connection with *Allen v. Flood* (e). Their presence is necessary at trials of peers as in Earl Russell's case (1901) and Lord De Clifford's case (1935). No writs are issued to the Scots representative peers, who are elected afresh for each Parliament at a meeting of the Scots peers directed to assemble for that purpose by proclamation (f). The writs to the returning officers are in the form provided by the Ballot Act, 1872 (g); nominations by a proposer and a seconder, which must be signed by eight other electors, take place on the 8th day after the proclamation; if an election is necessary, it falls on the ninth day thereafter (h).

**Opening of Parliament.**—Upon the day appointed in the proclamation the Sovereign opens Parliament either in person or normally through five Lords Commissioners appointed under the Great Seal. The Commissioners sit on a form placed between the throne and the Woolsack. The Commons, who have been previously summoned to the House of Lords, are directed by the Lord Chancellor to choose a Speaker; the Commons then retire, elect their Speaker, and adjourn until the following day, when the Speaker is summoned to the House of Lords and submits himself for the approval of the Crown, which is since 1679 when Charles II. took exception to Sir Edward Seymour and a compromise was reached, purely formal and is signified by the Lord Chancellor. The Speaker then demands "the ancient and undoubted rights and privileges of the Commons" (i), which are granted, and the Speaker returns to the lower House.

In the case of a new Parliament, before the members of either House are entitled to sit and vote, they must now give evidence of their title, and take the oath of allegiance.

**Evidence of Title.**—In the Lords those who have received writs of summons present them at the table of the House, upon which also is laid the roll of those entitled to receive writs, prepared by Garter King of Arms.

The Clerk of the Crown delivers a certificate of a return made to him by the lord clerk register of Scotland of the names of the Scots representative peers. New peers present their patents to the Lord Chancellor and these with their writs of summons are read by the Clerk of the House; they must also be formally supported by two peers (k).

(e) [1898] A. C. 1.

(f) 6 Anne, c. 78; 14 & 15 Vict. c. 87. See H. L. Paper 1935—36, No. 10.

(g) 35 & 36 Vict. c. 33; see May, Const. Hist. iii, 24—27.

(h) The writs were returnable formerly in forty and then from 1707 in fifty days, altered to thirty-five days by 15 & 16 Vict. c. 23. See now 8 Geo. V. c. 64, Sched. 2, Part I., 2A, 14A.

(i) As to these, see *post*, p. 67.

(k) Standing Orders, No. 13, 15 (1936).

In the Commons the Clerk of the Crown in Chancery delivers to the Clerk of the House a book containing the names of members appearing in the returns to the writs issued; in the case of a bye-election the member hands in a certificate obtained from the Public Bill Office of the House.

**The Parliamentary Oath.**—Formerly, there were three parts to the Parliamentary oath: (1) the oath of supremacy, repudiating the spiritual or ecclesiastical authority of any foreign prince, person, or prelate. This was imposed upon the Commons in the fifth year of Elizabeth (*l*). (2) The oath of allegiance, which was imposed upon the Commons in the reign of James I. (*m*), and in the reign of Charles II. both Lords and Commons were required to take the oaths of supremacy and allegiance at the tables of their respective Houses, a declaration against transubstantiation being added at the same time (*n*). These oaths were altered in form but not in substance after the revolution (*o*). (3) The oath of abjuration, renouncing all adherence to the person (*viz.*, the son of James II.) who since the death of James II. had set up a title to the Crown under the style of James III., was added in the reign of William III. (*p*).

The penalty imposed for sitting and voting without having taken these oaths was at first extremely serious, but under George I. was £500 for each offence, and disability to hold any office or to sit in either House (*q*). Quakers were in certain conditions by statute allowed to affirm (*r*). The declaration against transubstantiation and the oath of supremacy prevented Roman Catholics from sitting, whilst the oath of abjuration, terminating with the words “on the true faith of a Christian,” debarred the Jews. To remedy these evils the Roman Catholic Relief Act, 1829 (*s*), provided a form of oath to be used by Roman Catholics, and abolished altogether the declaration against transubstantiation. In 1858 a single form of oath for Protestants was substituted for the three oaths of supremacy, allegiance, and abjuration, and either House was empowered to dispense with the words “on the true faith of a Christian” in individual cases (*t*), or in 1860 by standing orders. By the Parliamentary Oaths Act, 1866 (*u*), a single form of oath was provided for persons of all denominations, the words obnoxious to Jews being omitted altogether, and Quakers, Moravians, and other people to whom the taking of an oath of any sort was objectionable were permitted to make an affirmation in the form

(*l*) 5 Eliz. c. 1, s. 16. It had been taken since 1558.

(*m*) 7 Jac. I. c. 6, s. 8. It had been taken since 1554. These oaths could be taken before the Lord Steward in the Court of Requests.

(*n*) 30 Car. II. st. 2, c. 1.

(*o*) 1 Will. & Mar. c. 8.

(*p*) 13 Will. III. c. 6.

(*q*) 1 Geo. I. st. 2, c. 13, ss. 7, 8. In 1866 only the pecuniary penalty was retained.

(*r*) See 8 Geo. I. c. 6; 22 Geo. II. c. 46; 3 & 4 Will. IV. c. 49 (also Moravians); 1 & 2 Vict. c. 77 (ex-Quakers, ex-Moravians and Separatists).

(*s*) 10 Geo. IV. c. 7. See 16 & 17 Geo. V. c. 55.

(*t*) 21 & 22 Vict. c. 48, and c. 49, extended by 23 & 24 Vict. c. 63. See *Miller v. Salomons* (1851) 7 Exch. 475; 8 Exch. 778.

(*u*) 29 & 30 Vict. c. 19.

prescribed. In *Bradlaugh's Case* (x) it was held by the Court of Appeal that the provisions of the Parliamentary Oaths Act, 1866, as to affirmation, did not apply to the case of those who had no religious belief at all, and therefore on whom an oath would not be binding. This was remedied by the Oaths Act, 1888 (y), which provided that in all places and for all purposes where an oath is required by law, any person stating that he has no religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make a solemn affirmation.

The ordinary Parliamentary oath may be taken now in the form provided by 31 & 32 Vict. c. 72, s. 1, or that under s. 2 of the Oaths Act, 1909; it is as follows:—

“I do swear that I will be faithful and bear true allegiance to His Majesty King George the Sixth, his heirs and successors according to law. So help me God.” Failure to take the oath involves no penalty, save loss of salary, but sitting or voting vacates the seat and renders the offender liable to a penalty of £500 for each occasion.

On the demise of the Crown it is customary for members to take the oath to the new sovereign when Parliament meets, and this was done in December, 1936, but this is not provided by statute but by the custom of Parliament.

**Speech from the Throne.**—These preliminaries having been disposed of (z), the business of each session is invariably opened by a speech from the Throne, dealing with the general political situation, and indicating in outline the purposes for which the Parliament has been summoned. The speech is read either by the Sovereign in person, or, if Parliament is opened by commission, by the Lord Chancellor, the Commons having been in the one case *commanded*, or in the other case *desired*, to attend at the bar of the House of Lords. The speech deals in outline with the general political outlook, the legislative measures to be introduced during the session, and in a portion addressed to the Commons alone calls attention to the requirements of the Crown for supplies to carry on the government of the country. The speech having been read, the Commons retire, and in each House an obsolete bill—on Select Vestries in the Lords, on clandestine outlawries in the Commons—is read for the first time in order to mark the right of the

(x) *Att.-Gen. v. Bradlaugh* (1885), 14 Q. B. D. (C. A.) 667. In *Bradlaugh v. Clarke* (1883), 8 App. Cas. 354, it had been decided that the penalty of £500 could only be recovered by the Crown, not by a common informer. In 1880 the Commons had permitted him to affirm, but this could not bar action. In 1884 he purported to administer the oath to himself, whereupon the penalty was successfully claimed for the Crown. In 1886 he was permitted by the Speaker to take the oath, and the matter was not further pressed in the Courts. Mr. Speaker Brand should have acted thus in 1880. In 1891 the resolutions excluding him were expunged by vote of the Commons.

(y) 51 & 52 Vict. c. 46. This brought the law as to the Parliamentary oath into harmony with the oath in judicial proceedings: Evidence Amendment Acts, 1869 (32 & 33 Vict. c. 68), and 1870 (33 & 34 Vict. c. 49), on which Mr. Bradlaugh had based in part his claim to affirm.

(z) At the commencement of a session of an already existing Parliament these preliminaries are not necessary, and the session is opened directly by the speech from the Throne.

two Houses to initiate legislation independently of the King's speech (a). The speech is then read a second time in both Houses, and an address in reply, having been settled and approved, is presented to the Sovereign by either House, by lords who are officers of the household and members of the Privy Council respectively.

### *The Termination of Parliament.*

The sitting of Parliament may be terminated either by dissolution, prorogation, or adjournment.

**Dissolution.**—This brings the life of an existing Parliament to an end, and may be effected in two ways: (a) By an exercise of the Crown's *prerogative*. If Parliament is sitting, this may be done either in person or by Royal Commission, but the more usual method is first to prorogue Parliament, which may then be dissolved by proclamation (b).

Dissolution is now essentially exercised on ministerial advice (c), and it is impossible to lay down principles deciding when that advice should be given. But certain points are fairly clear. (1) Any important change contemplated by a ministry which has not been clearly put before the electorate should by a dissolution be pronounced upon. Thus Mr. Baldwin appealed for a mandate for protection in 1923 unsuccessfully, though the reform of the corn laws and the Home Rule Bill of 1886 were introduced without a mandate, and the Reform Act of 1867 was passed by a Conservative Government which had once opposed reform. Twice in 1910 was the country consulted over the contest between the two Houses of Parliament; and, though in any case an election was overdue in 1918, the time chosen was based on the need of a mandate for the making of peace and social reform. In 1931 a mandate was needed for tariffs and finance; in 1935 for a continuance of governmental policy. But in that case the end of the Parliament by efflux of time was approaching, and Mr. Baldwin maintained that paramount reasons of public convenience demanded that a dissolution should be held in November (d). Nevertheless in 1936—37 rearmament was undertaken not merely without a mandate but in face of an undertaking in a different sense, and the abandonment of Ethiopia and Czechoslovakia to Italy and Germany in 1936 and 1938 ran counter to the expressed policy of the Ministry at the election of 1935 (e).

- (2) If a ministry resigns as in 1846, 1852, 1885, 1905, and 1922, or is completely reconstructed as in 1931, a dissolution is clearly necessary.
- (3) An extension of the franchise renders a dissolution appropriate, as in 1832; the same consideration had weight in 1868, when Mr. Disraeli dissolved, in 1885 when Lord Salisbury dissolved, and in 1918.
- (4) If defeated in the House, a ministry may legitimately appeal to

(a) House of Lords Standing Orders No. 2; now that outlawry is abolished, a new bill might be chosen for the Commons. (1 & 2 Geo. VI. c. 63, s. 12.)

(b) In 1922 Parliament was dissolved when adjourned.

(c) In 1783 and 1834 the King changed his ministry, in the first case against the wishes of the ministers, in the second case apparently so, and dissolved on the new ministry's advice.

(d) Keith, *The King and the Imperial Crown*, pp. 174 ff.

(e) Cf. Sir S. Hoare, *House of Commons*, October 23, 1935.

the electorate, as did Lord Melbourne in 1841, Lord Palmerston in 1857 on a vote of censure of his Chinese policy; Lord Derby in 1859, Mr. Disraeli in 1868, and Mr. Gladstone in 1886 on the defeat on the Home Rule bill, and in 1924 on Mr. MacDonald's defeat on the issue of failure to enforce the law. (5) If Parliament is near expiration by efflux of time, it may properly be dissolved as in 1865, 1874, and 1892. In 1880 and 1900 this motive was enhanced by the desire to use promising circumstances to secure a majority, in the former case unsuccessfully (*f*).

There is no precedent, since the establishment of the principle of collective Cabinet responsibility on which Parliamentary government depends, in support of the doctrine that a Prime Minister can advise a dissolution when he pleases irrespective of the views of his colleagues in the Cabinet. Mr. Baldwin's apparent claim to the decision in 1935 may refer to the choice of date for a dissolution advised in principle by the Cabinet (*g*), but it may be a sign of his belief in the paramount position of the Prime Minister seen in his insistence on giving equal suffrage in 1928 as included in his election promises. But it is probable that a Prime Minister would normally have the deciding voice, since by resignation he could dissolve the ministry, and except under very abnormal circumstances a dissolution would then be inevitable.

(b) *Effluxion of Time*.—The second way in which Parliament may be dissolved is by the natural effluxion of time. The Triennial Act, 1694 (*h*), limited the life of Parliament to three years, but on the accession of George I., the country being in an unsettled state, and the prospect of a dissolution appearing likely to promote rebellion, Parliament passed the Septennial Act, 1716 (*i*), prolonging its own and the life of future Parliaments to a term of seven years. Now under the provisions of the Parliament Act, 1911 (*k*), the duration of Parliament is limited to five years. But by the same Act it is provided that measures for extending the duration of Parliament are excluded from the operation of the Act, and the Acts from 1916 to 1918 necessary to prolong under war conditions the life of the Parliament elected in 1910 were passed in the ordinary way but not without some comment.

Formerly Parliament was dissolved by the demise of the Crown, but by the Representation of the People Act, 1867 (*l*), the duration of the

(*f*) Monypenny and Buckle, *Disraeli*, ii, 1380 ff. In 1938 Mr. N. Chamberlain stated that he would not dissolve to exploit his return with peace with honour so long as no new issue needing a mandate arose and he retained the confidence of the Commons (October 6, House of Commons).

(*g*) Professor Swift MacNeill, *The Times*, November 14, 1923. In 1927 the Governor of New South Wales allowed his Premier to reconstruct the ministry in order to dissolve. See Oxford, *Fifty Years of Parliament*, ii, 194—196; Keith, *Letters on Current Imperial and International Problems*, 1935—1936, pp. 31, 32; *The British Cabinet System*, 1830—1938, pp. 396 ff., 560.

(*h*) 6 & 7 Will. & Mar. c. 2. Previously to this the first Triennial Act (16 Car. I. c. 1), limited the duration of Parliament to three years; but this was repealed in 1664 (16 Car. II. c. 1) as being contrary to the prerogative, the same Act providing that Parliament should be held three years at the furthest from the previous Parliament. The Triennial Act, 1694, continued this provision, at the same time limiting the duration to three years.

(*i*) 1 Geo. I. st. 2, c. 38. Assented to May 7, 1716.

(*k*) 1 & 2 Geo. V. c. 13, s. 7.

(*l*) 30 & 31 Vict. c. 102, s. 51. Under 7 & 8 Will. III. c. 15, and 6 Anne, c. 41, a Parliament in being continued for six months after the royal demise.

existing Parliament is no longer affected by a demise of the Crown. If a demise of the Crown occurs during a dissolution, before the date fixed for the meeting of a new Parliament, the preceding Parliament is revived for six months (*m*). In any case the Houses meet immediately without special summons to take the oath of allegiance to the new Sovereign (*n*).

**Prorogation.**—This terminates a session of Parliament, and is effected by an exercise of the Crown's prerogative, either by the Sovereign in person or by commissioners appointed for that purpose under the Great Seal; the Standing Orders No. 3 of the Lords require "a commission," the commissioners desiring the presence of the Commons to hear the commission read by the clerk. A formal speech from the Crown expresses thanks for supply and congratulations on useful legislation passed. Impeachments and appeals are not affected by prorogation, but imprisonment by Order of the Commons, or, if no term is fixed, of the Lords, ends. A bill which has passed some but not all of its stages at the time of prorogation or dissolution must begin at its earliest stage in the next session, unless a special resolution is passed to permit carrying over. This is regularly done as regards private bills and provisional orders, but rarely in other cases and only of recent years. If it is desired to postpone the meeting of a new Parliament or to postpone the date of the meeting of Parliament to a later date than that fixed at the time of prorogation, this is done by proclamation (*o*). Power exists to summon Parliament when prorogued (*p*), and in some cases it must be summoned (*q*).

**Adjournment.**—This does not put an end to the existence or to a session of Parliament, but postpones the further transaction of business for a specified time, and is effected in either House by resolution.

The Crown has no power to compel either House to adjourn, but where both Houses stand adjourned for more than fourteen days, it can compel their meeting at an earlier date by proclamation (*r*).

**Royal Communications.**—The speeches at opening, prorogation or dissolution, and formal assent to bills are the only occasions of the Crown's presence in fact or by Commissioners in the House of Lords (*s*). On purely formal occasions, *e.g.*, a request for supply or an intimation of permission to deal with a matter of prerogative or royal property, the Crown communicates by message either under the sign manual

(*m*) 37 Geo. III. c. 127.

(*n*) For the case of prorogation or adjournment, 6 Anne, c. 41, s. 5, makes provision.

(*o*) 30 & 31 Vict. c. 81.

(*p*) Meeting of Parliament Act, 1870 (33 & 34 Vict. c. 81) (six days' notice).

(*q*) On the issue of a proclamation under the Emergency Powers Act, 1920 (10 & 11 Geo. V. c. 55), within five days; on calling out the army reserves, within ten days, 45 & 46 Vict. c. 48, s. 13, or air force reserves, 24 & 25 Geo. V. c. 5, ss. 12, 13, or embodiment of territorial army, 7 Edw. VII. c. 9, s. 17. See now Addenda.

(*r*) 39 & 40 Geo. III. c. 14, amended by 33 & 34 Vict. c. 81.

(*s*) Charles II. was the last King frequently to attend the debates of the Lords, and the last to rebuke their disorderly conduct (1671); 12 L. Journ. 413, since Anne the practice has never been revived. Presence in the Commons was always out of the question, and Charles I.'s violation of this rule on January 4, 1642, was indefensible; 2 Com. Journ. 368.

delivered to the Lord Chancellor and Speaker, or reported verbatim by a minister or officer of the household; otherwise the indulgence of the House concerned is necessary and any statement must be one of fact, not to influence the House's judgment (*t*), for it is an absolute rule that any allusion to the personal wishes of the King or the use of his name to influence debate is forbidden. The Houses communicate by address on important issues, on other matters (*e.g.*, condolences) by message.

### *Parliamentary Officials.*

**The Speaker and Chairman of Committees of the House of Lords.**—The prolocutor or Speaker of the House of Lords is the Lord Chancellor, when that office is filled (*u*), but in case a vacancy occurs the Lords may choose their own Speaker. As the Woolsack on which the Speaker sits is outside the limits of the House, in order to officiate as Speaker the Lord Chancellor need not necessarily be a peer, though he almost invariably is so; an instance to the contrary, however, occurring in 1830, in the case of Mr. Brougham (*x*). A newly appointed Lord Chancellor is wont to take his seat on the Woolsack before he is introduced as a peer. In his absence his duties are performed by a deputy Speaker, of whom several are usually appointed by commission under the great Seal (*y*).

The duties of the Speaker of the House of Lords are not so extensive as those of the Speaker of the House of Commons; he has no power to rule on points of order, no casting vote, and generally his powers are the same as those of an ordinary member, his duties being confined to merely formal acts, such as signifying the approval of the Crown to the election of the Speaker of the House of Commons, reading the royal speech and messages from the Crown, desiring the attendance of peers as witnesses, appointing tellers, and putting questions and the like. Occasionally he may by personal authority guide the course of debate to check irrelevance, but the exercise of this power is resented and has been oppressive (*z*). In addressing the House the Lord Chancellor has precedence by courtesy. The Chairman of Committees is nominated at the beginning of each session of Parliament; he acts as chairman when the House is in Committee, and regularly holds office during the whole of a Parliament. He has important functions in respect of private bills.

**The Speaker and Chairman of Committees of the House of Commons.**—This official, who may be seen in 1343 in the reporter, Sir William

(*t*) See (1876), 228 Hansard, 3 s. 2037; Monypenny and Buckle, *Disraeli*, ii, 817 ff. (Mr. Lowe's statement, denounced as false, that the Queen had raised the point of being made Empress of India with previous ministries happened to be true); December 14, 1921, 149 H. C. Deb. 5 s. 44 (Irish Free State).

(*u*) Standing Order Nos. 2 and 5.

(*x*) See May, *Parl. Pract.*, p. 187.

(*y*) Standing Order No. 5.

(*z*) Standing Order No. 20. Hence any peer may intervene to suggest the necessity of observing the rules of order, *e.g.*, that against personal speeches; Fitzmaurice, *Granville*, ii, 109 f.; Standing Order, No. 28. Lord Cave's use of his power to closure debate on July 8, 1926, was resented.

Trussel, of the resolutions of the Commons (a), and whose existence (b) has been continuous from 1377 and who from 1689 to 1905 was the first commoner in precedence, is appointed at the commencement of a new Parliament, in the manner described above (c), and his office lasts for the whole Parliament. By practice he is always re-elected so long as he desires; his position prevents him standing as a party man, and opposition is therefore rather unfair. In 1935, however, Captain FitzRoy was opposed by the Labour Party, which offered on the other hand to support a Bill to exempt the Speaker from having to seek re-election. It is in fact unfortunate that a seat should lose the advantage of having an active representative, and some such solution as making the Speaker supernumerary, as in Eire, seems advisable; in 1938 the issue was referred to a Committee. On retirement he is given a pension and offered a peerage. His principal duties are to act as the representative and mouthpiece of the House collectively upon all occasions, to preserve order in the House and in debates, and to rule upon points of order. He decides under the Parliament Act, 1911, s. 1 (2), whether a bill is or is not a money bill; he determines under the Ministers of the Crown Act, 1937, who is to be paid salary as leader of the opposition party with the greatest number of members; he admonishes or reprimands members, issues warrants of commitment of offenders against the privileges of the House, and desires the attendance of witnesses. He issues warrants for elections to fill casual vacancies. The Speaker puts the questions and declares the result of a division, and in case of an equality of votes he has a casting vote, though otherwise he never votes. He nominates each session a panel of not less than ten members from which he appoints the chairmen of standing committees (d). On entering and leaving the House, and on State occasions, the mace is borne before him by the Serjeant-at-Arms as the symbol of his authority.

The Chairman of Ways and Means is appointed on the motion of the leader of the House at the beginning of each Parliament, or on a vacancy; he takes the chair in committee and can act in case of need or on request as Deputy Speaker; he maintains order in committee, and can name members for irregular conduct, but before a member is suspended the Speaker's presence is necessary. He shares with the Chairman of Committees in the Lords functions as to private bills. There is a deputy chairman appointed by the House since 1902 (salaried,

(a) *Rot. Parl.* ii, 136 (1343); 374 (1377).

(b) The prototype of the Speaker may be seen in ecclesiastical prolocutors and the *procurator totius Anglie* who, in 1327, announced his deposition to Edward II.: Clarke, *Medieval Representation and Consent*, pp. 344 ff.

(c) *Ante*, p. 48. Under the Tudors the Speaker's business was to guide the Commons in the manner desired by the Crown. Lenthall in 1640 marks the appearance of representation of the Commons against the Crown; Onslow (1727—61) marks the assertion of impartiality, but it became regular only a century later. The refusal to re-elect Mr. Manners Sutton, an active politician outside the House in 1835, marks the new tradition; he occasionally spoke in the House. For older altercations between Speaker and members, see May, *Const. Hist.* i, 394. By Order in Council, May 30, 1919, he ranks after the President of the Council.

(d) Standing Order No. 80. This is an innovation of 1933—34.

as is the chairman). The Deputy Speaker Act, 1855 (e) validates acts done by a deputy.

**Other Officials of Parliament.**—Other Parliamentary officials are—The Gentleman Usher of the Black Rod in the House of Lords, who is appointed by the Crown by letters patent. He desires the attendance of the Commons at the opening and proroguing of Parliament, and when the royal assent is given to bills, and executes orders of commitment. The clerk of the Parliaments in the House of Lords and the clerk of the House of Commons who is under-clerk of the Parliaments, are appointed by letters patent from the Crown; their duties are principally to sign orders, endorse bills, make entries and keep the records of either House. The clerk of the Commons acts for the Speaker on the occasion of his election.

The Serjeants-at-Arms in either House are appointed by the Crown by letters patent, they attend the Speakers of either House with the mace, and the Serjeant-at-Arms of the House of Commons (whose duties are more extensive than those of the Serjeant-at-Arms in the Lords) executes warrants of commitments, brings prisoners to the bar, secures the withdrawal of members at the Speaker's order, attends to the services of messages and orders, sees to the withdrawal of strangers, and maintains order in lobbies and passages, together with various other duties (f).

**Government and Opposition Whips.**—Every party requires whips to control the presence of members at debates, to arrange pairs so as to allow leave of absence to members, and to keep the party leaders in touch with the rank and file, and often also with the local party associations; especially have they opportunities to influence the local choice of candidates, for the Chief Whip has normally control of the central party funds, and the vast majority of candidates cannot stand without assistance from that source. In the case of the Government the Parliamentary Secretary to the Treasury is chief whip; junior lords aid him (g). Their duty is of fundamental importance, for the Chief Whip has to advise the government when business can best be taken or postponed, and as to the wisest way to allocate Parliamentary time as between the various measures the government has on hand.

(e) 18 & 19 Vict. c. 84. The Chairman of Ways and Means is also chairman of Supply, and of the Standing Orders Committee and of committees on unopposed Bills; Standing Orders, Private Business, Nos. 98, 111.

(f) For the duties of the various officials, see May, *Parl. Pract.*, pp. 193 ff. On House of Lords Offices there is a committee report, H. L. 20, 1938—39. Parliament sits in the Royal Palace of Westminster in buildings replacing those destroyed by the fire of 1834. The chapter house of Westminster was allocated to the Commons from Hilary, 1352: *Rot. Parl.* ii, 237, 322. It is under the formal authority of the Lord Great Chamberlain. The Palace is not a royal residence so as to fall under the rule forbidding exercise of jurisdiction therein: *Combe v. De la Beere* (1882), 22 Ch. D. 316.

(g) Salaries for all are provided by the Ministers of the Crown Act, 1937 (1 Edw. VIII. & 1 Geo. VI. c. 38), ss. 1 (3), 10. They are aided by the Treasurer of the Household, the Comptroller and the Vice-Chamberlain, all of whom receive £1,000 a year, and by unpaid assistant whips, at present three in number.

## CHAPTER II.

## THE HOUSE OF COMMONS.

*The Electorate.*

**History of the Franchise.**—The knights of the shire were elected by those who were suitors to the county court in the first place, but probably by 1406 (a) all freemen present at the court took part. In 1430—32 (b) the franchise was restricted, apparently in the hope of securing a more reliable electorate in a time of grave corruption and intimidation of the voters, to freeholders of 40s. annual value, resident and qualified in the county; but residence was not in practice enforced and was repealed in 1774 (c). Gradually the franchise was extended to cover leases for lives, annuities, rent charges, and holders of certain offices. The borough franchise, originally popular, became restricted by usage or royal grant and varied greatly, being held either: (1) by burgage tenants (d); (2) residence usually as a householder, and payment of scot and lot, contributions to charges with liability to serve in office; (3) incorporation as a freeman, *e.g.*, by birth, marriage, apprenticeship, purchase or gift; (4) corporate office, when the corporation alone secured power. The process of restriction is marked in the grant of charters from Henry VI. onwards, and corresponds in part to the process by which the merchant guild came to be identified (e) with the older town community, so that the vote became confined to freemen or the officers of the corporation. The Tudors enfranchised boroughs, restricting as a rule the franchise to the corporation, as in the case of Cornwall, to add to their control of the Commons, and the Commons by deciding in a restrictive sense disputed elections added to the limitations of the franchise; in 1729 it was enacted (f) that the last determination in the Commons should decide the franchise. It depended thus on custom and judicial decisions of men influenced by partisan and personal interest in the restriction of the vote.

The Reform Act of 1832 (g) restricted the 40s. freehold in cases where the estate was not for life and not in occupation, but gave the franchise

(a) 7 Hen. IV. c. 15; Pasquet, *H. of Commons*, pp. 139—154. For minor jury functions the duty of suit had been limited to those with 40s. revenue from land by statute, December 12, 1293. Stubbs, *Const. Hist.* iii, 419, holds that the rule of a wide vote goes back to Edward III.

(b) 8 Hen. VI. c. 7; 10 Hen. VI. c. 2. The sheriff might examine claimants on their oath. (c) 14 Geo. III. c. 58.

(d) On this tenure, see J. Tait, *The Medieval English Borough*, ch. iv.

(e) For the limits to be put on this identification, see Tait, *op. cit.*, pp. 249 ff. Cf. Jolliffe, *Medieval England*, pp. 317 ff.

(f) 2 Geo. II. c. 24, s. 4.

(g) 2 & 3 Will. IV. c. 45; analogous measures were for Scotland, c. 65; for Ireland, c. 88. The details cannot here be given.

to £10 freeholders in all cases, copyholders, and lessees for sixty years, to leaseholders for twenty years of £50 value, and to occupiers of £50 rent. In the towns it established an occupation franchise of £10 annual value. The Act of 1867 (*h*) gave a £5 franchise for the £10 of 1832 and added a £12 rateable value for the counties; for towns it added the household franchise by occupation as owner or tenant and the £10 unfurnished lodging qualification, both on twelve months' residence. The Act of 1884 (*i*) extended to the counties the householder or inhabitant occupation and lodger franchise and added a new franchise of occupation in virtue of office, service or employment. It reduced to £5 the county leasehold for sixty years' franchise and extended the occupation franchise to owners or tenants of any land or tenement of £10 clear annual value. The Act of 1832 gave the vote to the middle classes, that of 1867 added the town workers, that of 1884 the countrymen, in so far as they might be deemed to have stability of character and capacity to exercise wisely the vote. The changes of 1918, including the vote for many women over age 30 (*k*), were the product of war conditions, the dominant argument as regards men being the right of all compelled to serve in war to vote in peace, no regard being paid to the issue of the interest of the State in the capacity of its voters. The extension of women's suffrage in 1928 was similarly defended as a carrying out of the Premier's personal pledge rather than on reasoned grounds. There was admittedly no mandate from the electorate.

**The Present Franchise.**—Under the Representation of the People Acts, 1918 to 1928, a man is entitled to be registered as an elector if he is a British subject and of full age and under no legal incapacity. Further, he must have the requisite residence qualification or business premises qualification, that is, he must during the last day of the qualifying period be residing (*l*) or occupying business premises in the constituency and must during the whole of that period have resided or occupied business premises in the constituency, or in another constituency within the county or borough or a contiguous county or borough, or one separated by not more than six miles of water. The administrative county of London is treated as a single borough for this purpose. The qualifying period is three months, ending June 1; the register takes effect on October 15. "Business premises," means land or other premises of the yearly value of £10 at least occupied for the purpose of business, profession or trade (*m*).

The Act of 1918 gave the vote to women, of age thirty or over, who were entitled to be registered as local government electors, or were wives

(*h*) 30 & 31 Vict. c. 102; Scotland, 31 & 32 Vict. c. 48; Ireland, c. 49.

(*i*) 48 Vict. c. 3.

(*k*) Efforts to claim the vote based on the argument that, unlike the Act of 1832 which used the term "male person," s. 3 of the Act of 1867 used the term "man," which, by 13 & 14 Vict. c. 21, normally included females, were a failure on the score, *inter alia*, of the Common law disqualification, which could only be removed by express words: see *Chorton v. Lings* (1869), L. R. 4 C. P. 374; *Nairn v. University of St. Andrews*, [1909] A. C. 147.

(*l*) *Ferris v. Wallace*, [1936] S. C. 561; residence in a hut on a plot at week-ends not sufficient for residential franchise.

(*m*) 7 & 8 Geo. V. c. 64; 18 & 19 Geo. V. c. 12.

of such electors. The Representation of the People (Equal Franchise) Act, 1928, equalised the franchise, and in the case of a business qualification extended it to the wife or husband. 2

A man or woman is entitled to be registered as an elector for a university if he or she is of full age and not subject to any legal incapacity and has received a degree other than an honorary degree at such university, or, in the case of Scottish universities, is qualified under section 27 of the Representation of the People (Scotland) Act, 1868 (n).

Every person on the register is, *primâ facie*, entitled to vote, but no person, whether man or woman, may have more than two votes, one of which must be a residence vote (s. 8).

A person is not disqualified from voting by reason that he has received poor relief or other alms, nor by reason that he is employed for payment by a candidate at the election so long as the employment is legal (s. 9). The disabilities of revenue, excise and stamp officers disappeared in 1868 and 1874, and of police in England and Scotland in 1887.

**Disqualifications.**—Certain persons are disqualified from exercising the franchise. These are—

- (1) Infants (o), as all persons to be registered must be of full age on the last day of the qualifying period. There was a temporary exception for those aged nineteen who had served in the Great War.
- (2) All peers, both of the realm and of Parliament, but the incapacity of a peer to vote at an election does not extend to peeresses in their own right (p), or to Irish peers actually serving in the Commons.
- (3) Persons convicted of treason or felony, unless the conviction has been quashed, or unless they have served their sentence or received a pardon (q).
- (4) Persons convicted of corrupt practices (other than personation, or aiding, &c., personation, which are felonies) may not vote at an election in the United Kingdom for seven years (r).
- (5) Persons convicted of an illegal practice, and candidates or agents who are convicted of illegal payments, employment, or hiring, may not vote at an election in the place where the offence was committed within five years (s).
- (6) Aliens, unless naturalised, or unless they have been made denizens by letters patent (t).
- (7) Idiots certainly, and lunatics, unless the returning officer is satisfied that at the time of voting they are sufficiently

(n) 31 & 32 Vict. c. 48.

(o) 7 & 8 Geo. V. c. 64, ss. 1—5, 41 (7).

(p) 7 & 8 Geo. V. c. 64, s. 9 (5). See *Beauchamp (Earl of) v. Overseers of Madresfield* (1872), L. R. 8 C. P. 252; *Marquis of Bristol v. Beck*, 96 L. T. 55. The former practice of the Commons by sessional resolution to denounce any intervention of a peer in elections as a high infringement of the liberties and privileges of the House has been discontinued since 1911.

(q) Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 2.

(r) 46 & 47 Vict. c. 51, s. 6.

(s) 46 & 47 Vict. c. 51, ss. 10, 21.

(t) 33 & 34 Vict. c. 14, s. 2; 8 Geo. V. c. 64, s. 9 (3); 4 & 5 Geo. V. c. 17, s. 3 (1).

*compos mentis* to discriminate between the candidates and take the oath intelligently (*u*).

- (8) Returning officers, except in the case of an equality of votes, when they may give a casting vote (*x*). *Ballot Act 1872*

**Registration.**—The registration of Parliamentary voters is regulated by the Representation of the People Act, 1918, ss. 11—19 (*y*). Two registers of electors were to be prepared in each year, one in spring and one in autumn (s. 11); at present, on grounds of economy, one alone is prepared. Registration is undertaken at the public expense and on governmental initiative, as opposed to a claim by the person interested. But in the University constituencies the University registers and may charge £1 for this action. The control of registration rests since 1921 with the Home Secretary (*z*). Each Parliamentary borough and county is a registration area, the registration officer in the former being the town clerk, and in the latter the clerk of the county council (s. 12), and it is their duty to compile the registers (s. 13). An appeal lies to the county court from any decision of the registration officer on any claim or objection, and an appeal on a point of law will lie from the county court to the Court of Appeal, but no appeal lies from the Court of Appeal (s. 14).

Persons entitled to register as electors may claim to be placed on the absent voters' list, and the registration officer, if satisfied that the claimant may by reason of his employment be debarred from voting, shall place his name on such list, and the officer is bound to place on such list persons in the Army, Navy, or Air Service. Persons whose names are entered on the list may vote by proxy in certain cases (s. 23 and 10 & 11 Geo. V. c. 35); otherwise they may vote by post.

Even though upon the register, a person's vote is liable to be rejected by the returning officer or disallowed upon an election petition if subject to "some inherent or for the time irremovable quality (*e.g.*, infants and peers) in himself by which he is prohibited by statute or common law from holding the status of a Parliamentary elector" (*a*). This is not the case if the disqualification is such that objection ought to have been taken before the revising barrister, *e.g.*, formerly, disqualifications on the ground of property, or the receipt of parochial relief (*b*), or now on lack of due occupation.

(*u*) See Heywood on County Elections (2nd ed.), 260; Rogers on Elections (ed. 19), ii, 118. It may be that a lunatic so found by commission would always be held incapable.

(*x*) Ballot Act, 1872 (35 & 36 Vict. c. 33), s. 2.

(*y*) Amended by 12 & 13 Geo. V. c. 41, and 18 & 19 Geo. V. c. 12; on registration, 12 & 13 Geo. V. c. 12, s. 1, Sch.; 16 & 17 Geo. V. c. 9, s. 9, Sch. iii.

(*z*) See S. R. & O., 1921, No. 959, under Ministry of Health Act, 1919.

(*a*) The construction placed upon s. 7 of the Ballot Act, 1872, in *Stowe v. Jolliffe* (1874), L. R. 9 C. P. at p. 750. Sect. 7 enacts that every person whose name is upon the register shall be entitled to vote unless "prohibited by any statute, or by the common law of Parliament." Sect. 8 of 8 Geo. V. c. 64, is absolute in terms, but is probably still conditional; s. 9 (3) provides that the Act does not confer any right to vote on a person under legal incapacity to be registered or vote. To refuse a vote by a person on the register who is of capacity is ground for an action: *Ashby v. White* (1702), 2 Ld. Raym. 938; *Tozer v. Child* (1857), 7 E. & B. 377. Parents who seek to have children incorrectly on the register vote may be fined for misdemeanour.

*Disqualifications for Membership.*

**Former Restrictions.**—The knights from the counties who were summoned to early Parliaments were required by law to be resident therein, but evasion was apparently common (*c*), as also in the case of borough members (*d*); prohibitions against lawyers practising in the royal courts and sheriffs (*e*) equally had little effect. A definite legal restriction of county representation to knights or persons fit for knighthood, as opposed to yeomen (*f*), closed eligibility to persons who did not hold land of the value of £20 a year. Under Anne (*g*) this was made more stringent; county members had to own freehold or copyhold of £600 a year, borough members of £300; personalty was admitted in 1838 (*h*), and all property qualification was abolished in 1858 (*i*). Women were excluded until 1918 (8 & 9 Geo. V. c. 47).

**Present Restrictions.**—Those now disqualified are: (1) aliens, unless naturalised (*k*); (2) infants (*l*), though Charles James Fox spoke while under age; (3) lunatics or idiots proved in manner prescribed by reports to the Speaker (*m*), which are made first by any authority concerned in his committal or reception into any place as a lunatic, and then immediately and six months later by the authorities in lunacy; earlier the issue has been raised on a petition from constituents or as a matter of privilege (*n*); (4) peers (*o*) of English, Scots, British creations, but not as far as constituencies in Great Britain are concerned (*p*) Irish peers, unless elected to the Lords; (5) clergy of the established Churches of England and Scotland and Roman Catholic clergy (*q*); (6) traitors and convicted felons unless pardoned or having served their sentence (*r*); (7) bankrupts, who, if sitting, lose their seats in six months unless the bankruptcy is annulled or a discharge given attesting absence of misconduct (*s*); (8) judges of the Supreme Court, registrars in bankruptcy, commissioners of metropolitan police,

(*c*) 8 Hen. VI. c. 7; repealed by 14 Geo. III. c. 58.

(*d*) 1 Hen. V. c. 1; also repealed in 1774. An abortive proposal to repeal under Elizabeth evoked an early argument that a member represents the whole realm (1571): Hallam, *Const. Hist.*, i, 266 ff.

(*e*) 46 Edw. III. (1372). Repealed by 34 & 35 Vict. c. 116.

(*f*) 23 Hen. VI. c. 14.

(*g*) 9 Anne, c. 5.

(*h*) 1 & 2 Vict. c. 48.

(*i*) 21 & 22 Vict. c. 26.

(*k*) The restriction, even in case of naturalisation to those born of English parents, by the Act of Settlement, 1701 (12 & 13 Will. III. c. 2), s. 3, is no longer in force; British Nationality and Status of Aliens Act, 1914 (4 & 5 Geo. V. c. 17), s. 3 (1); *R. v. Speyer*, [1916] 2 K. B. 858.

(*l*) 7 & 8 Will. III. c. 25, s. 8; 6 Anne, c. 11; 4 Geo. IV. c. 55, s. 74.

(*m*) 49 Vict. c. 16.

(*n*) As in *Alcock's Case* (66 Com. Journ. 226), and *Mr. Stewart's Case* (162 Hansard, 3 s. 194).

(*o*) Should a peerage devolve on a member, the House may declare his seat vacant, if a writ of summons to the Lords is not at once moved for: H. C. Paper 272 of 1895. Nor can a peer continue to sit until he receives a writ of summons: *Lord Wolmer's Case*, 33 Hansard, 4 s. 1058, 1728.

(*p*) Union with Ireland Act, 1800 (39 & 40 Geo. III. c. 67), art. 4.

(*q*) 41 Geo. III. c. 63; 10 Geo. IV. c. 7, s. 9. Clergy of the disestablished Church in Wales can sit; Welsh Church Act, 1914 (4 & 5 Geo. V. c. 91), s. 2 (4). Before 1801, J. Horne Tooke was allowed to sit; *Parl. Hist.*, xxxv., 1349.

(*r*) 33 & 34 Vict. c. 23, s. 2.

(*s*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 32, 33; 1890 (53 & 54 Vict. c. 71), s. 9; 1914 (4 & 5 Geo. V. c. 59), s. 106.

county court judges, recorders for their boroughs, stipendiary magistrates in London and elsewhere, revising barristers in England for their districts, returning officers for the areas in which they act as such; barristers appointed to try disputed municipal elections; Scottish and Irish judges; paid sheriffs, sheriff clerks and town clerks in Scotland; (9) holders of pensions at pleasure of the Crown, save civil service, defence services, and diplomatic pensions; (10) holders of government contracts (*u*); (11) persons guilty of corrupt practices (*x*); (12) Comptroller and Auditor-General.)

The most essential distinction is the exclusion of (13) all civil servants as opposed to the political heads of departments, which lies at the root of the British form of administration, providing the necessary blending of continuity in government with adaptation to meet changes of public opinion.

(14) To them are assimilated a number of members of commissions and boards; Charity Commissioners, Crown Land Commissioners, members of Central Electricity Board, Livestock Commission, Spindles Board, Tithe Redemption Commission, London Passenger Transport Board, Traffic Commissioners, Welsh Church Commissioners, Special Area Commissioner, Sugar Commissioner, Unemployment Insurance Statutory Committee members, Coal Mines Commission, Chairman and Deputy Chairman of London Quarter Sessions, Advisers to the Secretaries of State for India and Burma, full time officers of English county councils.

Exclusion of office-holders wholesale was proposed by the Act of Settlement (*y*), but this was repealed, and in 1707 (*z*) an Act provides that no one can be elected who has accepted a new office created since October 25, 1705; that the holders of certain offices cannot be elected; but that, while acceptance of other offices (*i.e.*, old offices) vacates a seat, the holder can be re-elected; the Act has no application to commissions in the defence forces. Subsequent Acts imposed disqualifications on acceptance of old offices, and have created new offices which can be held on re-election. Some offices are not technically under the Crown, such as Under Secretaries of State.

Re-election was dispensed with on exchange of office in the first place (*a*). By the Re-election of Ministers Act, 1919 (9 Geo. V. c. 2), a member was not to lose his seat by reason of acceptance of an office of profit under the Crown if that office was an office the holder of which was capable of being elected to or voting in the House *and if such acceptance had taken place within nine months after the issue of a proclamation summoning a new Parliament*. By an amending Act of

(*t*) *Re Sir Stuart Samuel*, [1913] A. C. 514. See 22 Geo. III. c. 45; 41 Geo. III. c. 52. For exclusion of certain kinds of contracts, see 21 Geo. V. c. 13. Subscriptions to various war loans were permitted by Acts of 1915–18, and to East India loans by 1 Edw. VIII. & 1 Geo. VI. c. 14, s. 11.

(*u*) See, for instance, William Preston Indemnity Act, 1925; 22 Geo. III. c. 45; 41 Geo. III. c. 52.

(*x*) 46 & 47 Vict. c. 51.

(*y*) 12 & 13 Will. III. c. 2, s. 3; repealed, 4 & 5 Anne c. 20.

(*z*) 6 Anne, c. 41, s. 24.

(*a*) 30 & 31 Vict. c. 102.

1926 the words in italics were removed and re-election terminated. The Act of 1919 also provides that, where a privy councillor is appointed to be a Minister of the Crown at a salary without any other office (*b*) being assigned to him, he shall not be incapable of being elected to or voting in the Commons, provided that not more than three such Ministers shall sit as members of the House at the same time. Not more than six Secretaries or Under Secretaries of State could sit in the Commons, but this rule is now varied so that three (including the Lord Chancellor) Cabinet Ministers (*c*) and four Under Secretaries (*d*) at least must be in the Lords (*e*).

The requirement of re-election was disliked because of the restrictions on formation of a ministry or its reconstruction resulting, and because on several occasions useful members (*e.g.*, Mr. Masterman) lost their seats and had to remain out of Parliament. On the other hand, the rule served a useful purpose in enabling the electors to express their opinions on new policies or personnel in the Ministry.

The Ministers of the Crown Act, 1937, added another exception to the exclusion of persons receiving salaries from the government from the Commons. The leader of the opposition is granted £2,000 a year, charged on the consolidated fund, and therefore not votable. The Speaker decides who he is in case of doubt. A former Prime Minister may receive pension under the Act without being excluded from the Commons.

Retirement of members is not permitted voluntarily, for the House is reluctant to declare vacant a seat on grounds of health or unwillingness to serve (*f*). Hence acceptance of an office of profit suffices, and a member who desires to retire now is granted the nominal office of steward of the Chiltern Hundreds or the Manor of Northstead (*g*). In 1740 the use of a royal manor in this way first occurs. Since 1775 the request, even if inconvenient to the Ministry, is only refused if an election petition is pending or criminal proceedings have been instituted.

#### *Distribution of Seats.*

The principles of 1295 were little varied as to the counties; Wales in 1536, Cheshire in 1543, and Durham in 1673 received representation. Scotland in 1707 added 30, Ireland in 1801, 64 members. Borough representation varied, for the borough had to pay its members, and a higher rate of tax. Henry VIII. and the kings down to Charles II.

(*b*) This does not prevent him having a definite sphere (League of Nations business for Mr. Eden in 1935); 25 & 26 Geo. V. c. 38, s. 1 (*b*).

(*c*) Of seventeen ministers of this rank, fifteen at most may be in the Commons.

(*d*) The Parliamentary Secretaries are reckoned in, making twenty-four in all; only twenty can be in the Commons.

(*e*) Ministers of the Crown Act, 1937, 1 Edw. VIII. & 1 Geo. VI. c. 38, Part II.

(*f*) For the case of Mr. Chubbe in 1604, see Oldfield, *Repr. Hist. of Great Britain*, iii, 346.

(*g*) For seven months in 1936—37 Lord Hugh Cecil did not sit or draw his salary, to avoid vacating his office of Provost of Eton, which is incompatible with any other salaried office, but did not ask for the Chiltern Hundreds until it was agreed that it was not really an office of profit in the ordinary sense.

increased their number in the interests of their control of the Commons, and many small places received representation (*h*), which was continued also in places which decayed. It was claimed that in 1832, 306 members were under the control of 160 persons, and in 9 boroughs there were not over 15 voters. The Act of 1832 disfranchised 56 boroughs absolutely and deprived 31 of a member, and gave them to counties and large towns, increased Scotland's share from 45 to 53, and Ireland's from 100 to 105. The total for England was 500, making as before a total of 658 seats. The Acts of 1867 and 1868 disfranchised 11 boroughs returning 17 members, and deprived 35 boroughs of one member each, Scotland receiving 60 members and Ireland 103 (*i*). The Redistribution Act of 1885 (*k*) deprived 79 English boroughs, 2 Scottish boroughs, and 22 Irish boroughs of representation, and 36 English boroughs and 1 Scottish borough of one members, taking 54,000 as a reasonable unit. It adopted the novel, though not unprecedented, principle of single-member constituencies on the grounds, according to Mr. Gladstone, of economy, simplicity, and possibility of minority representation (*l*). The Act of 1918 (*m*) adopted a unit of 70,000 for Great Britain and 43,000 for Ireland, merged 44 boroughs in counties, took 5 seats from sparsely inhabited rural areas and gave members to 31 new boroughs, making a total of 707 as opposed to 658 before 1885, and 670 then. This has been reduced to 615 by the constitutional changes in Ireland, and the position now is:—

England (492), county 230, boroughs 255, university 7;

Wales and Monmouthshire (36), county 24, boroughs 11, university 1;

Scotland (74), county 38, boroughs 33, university 3;

Northern Ireland (13), county 8, boroughs 4, university 1.

All are single-member constituencies, save 10 English boroughs (Blackburn, Bolton, Brighton, Oldham, Southampton, Stockport, Sunderland, Derby, Norwich, Preston), the City of London, Dundee, the Universities (Oxford, Cambridge, English Universities) with 2 members, the Scottish Universities with 3, and three Northern Irish counties (*n*). The English universities are Durham, Manchester, Liverpool, Leeds, Sheffield, Birmingham, Bristol, and, under 18 & 19 Geo. V. c. 25, Reading. The necessity of redistribution was frankly admitted by the government in 1936 and promised later.

(*h*) Henry VIII. gave representation to 5 boroughs; Edward VI. added 48 members; Mary, 21; Elizabeth, 60; James I., 27; under Charles I., 9 boroughs resumed membership by Commons' resolution and Charles II. summoned members from Newark. James I.'s first Parliament had 467 members of the Commons; the Long Parliament (1640), 504; that of 1661, 507; of 1679, 513. In 1295, 110 towns had been represented, but under Edward II. the average fell to 60.

(*i*) 30 & 31 Vict. c. 102; 31 & 32 Vict. cc. 48, 49. The Act of 1867 gave representation for London and the Scottish Universities; Oxford and Cambridge were given two members each in 1601.

(*k*) 48 & 49 Vict. c. 23.

(*l*) December 1, 1884; 294 Hansard, 3 s., 380.

(*m*) 7 & 8 Geo. V. c. 64.

(*n*) 10 & 11 Geo. V. c. 67, s. 19 (a), sch. 5, Pt. II.

*Elections.*

At a general election all polls must be held on one day (*o*), the eighth after the date of the Proclamation, when nominations are made in writing by a proposer and seconder, with eight assentors, all being electors; if more candidates than vacancies exist, the election voting falls on the ninth day; the poll is held from 8 a.m. to 8 p.m., but may on request be extended to 7 a.m. to 9 p.m. The elector marks with a cross at the polling place the voting paper given to him on his claim. The votes are sent from each place to the returning officer, counted, and he certifies the election by endorsing it on the writ which is returned to the clerk of the Crown in Chancery. A returning officer, if his duties are discharged by the acting returning officer, who is the registration officer, as is usually the case, can be a candidate (*s*. 30). Every candidate for Parliament must deposit £150 (*s*. 26). If the candidate is not elected and the number of votes polled by him does not exceed one-eighth of the total votes polled, or one-eighth divided by the number of members to be elected, the deposit is forfeited to the Crown, but in any other case the amount is returned to the candidate, though he cannot in any case recover more than one deposit (*s*. 27). Voting since 1872 is by ballot (*p*), which terminated the scandal of open voting with its facilities for intimidation and even bribery, and under the Blind Persons Act, 1933 (*q*), a blind person can be aided to record his vote by a friend or the presiding officer. Only in the case of the Universities is open voting preserved: as a rule the voter sends his paper duly witnessed to the returning officer by post (*r*). Reference has been made above to certain cases in which absent voting or proxy voting is allowed (*s*).

The expenses of the returning officer at a Parliamentary election, save in the case of University election, are now charged on the Consolidated Fund (*t*); in 1918 they had been made votable, but this was objected to, as by refusing a vote the Commons might have hampered a dissolution (*u*).

*The System of Voting.*

The principle of proportional representation is applied at contested elections for university constituencies where there are two or more members to be elected, each elector having one transferable vote.

(*o*) 7 & 8 Geo. V. c. 64, s. 21. In the case of by-elections the election must take place, in a county within nine days, in a borough within seven days, after the receipt of the writ. If polling is needed it falls six to eight days later. For the hours of polling, see 48 & 49 Vict. c. 10; 3 & 4 Geo. V. c. 6. Polling booths are provided by the local authorities: 7 & 8 Geo. V. c. 64, s. 31.

(*p*) 35 & 36 Vict. c. 33; 8 Geo. V. c. 64, s. 35; 10 & 11 Geo. V. c. 35, s. 3.

(*q*) 23 & 24 Geo. V. c. 27.

(*r*) 7 & 8 Geo. V. c. 64, s. 36 (1); Sched. V. The Vice-Chancellor is the returning officer.

(*s*) P. 60, *ante*; 7 & 8 Geo. V. c. 64, s. 3; amended by 10 & 11 Geo. V. c. 35, s. 2.

(*t*) Representation of the People (Returning Officers' Expenses) Act, 1919 (9 Geo. V. c. 8).

(*u*) 7 & 8 Geo. V. c. 64, s. 29 (2); 112 H. C. Deb. 5 s., 1334.

The same principle might be applied to other constituencies at a general election, if, and when, a scheme was prepared and approved by Parliament (s. 20); but no such scheme has been yet approved, for on May 13, 1918, the House of Commons rejected the proposal of the Lords to experiment with 100 seats in three-member constituencies, and as a result the vast majority of seats are in single-member constituencies decided by simple majority.

The operation of the present voting system admittedly results in returns out of any accordance with the numerical proportions of voters. An effort in 1867—1885 arranged multiple-member constituencies in which the voter could only vote for one less than the number of members, but it proved unpopular. The rise of the Labour party has accentuated the difficulty: in 1924 the Conservative party obtained a seat for 19,686 votes, Labour one for 38,383, Liberals one for 81,354, and the Conservative party was in an actual minority of votes. In 1929 the Conservatives with 8,658,918 votes obtained 269 seats, Labour (8,384,461) 289, Liberals (5,305,123) only 58. In 1931 circumstances were exceptional, but the Labour and Liberal parties were gravely under-represented. Thus the government parties with 14,531,925 votes won 493 seats, Labour with 6,648,023 votes 46 seats, and 477,358 votes returned nine members of different views; 61 government seats were uncontested, and 6 Labour. Even in 1935 the governmental total of 431 was very disproportionate to the voting (x).

The remedy for this lack of proportion has been sought in the *second ballot*, but French, New Zealand and New South Wales experience has discouraged support of this scheme. The result is bargaining for support, after the first ballot has failed to give a clear majority for any candidate, and principles are often subordinated to purely private ends. Nor is it desirable that party contests should be thus prolonged, sacrificing the advantage of simultaneous polling. The *alternative vote* as a second-best device was reluctantly accepted from Labour as a compromise policy by Liberals in 1931, but fell with the change of government. It is fairly general in use in Australian politics, where there are often three parties, two more or less anti-Labour, whose rivalry would otherwise result in Labour majorities based on split votes.

*Proportional representation*, passed by the House of Lords in 1918 and when in opposition approved by Labour, has been dropped by Conservatives and Labour when in power, but adopted by Liberals in opposition. The system is recommended on the principle of obvious fairness and public interest in the due expression of all substantial bodies of opinion. Men should not be restricted to a choice of two nominees of political organisations bound to their party principles. There should be room for men of independent judgment and moderate views. The system has worked well, it is claimed in Tasmania, and has saved the Irish Free State, and now Eire, from extreme action. It was successful in Northern Ireland in 1921 and 1925 and its abolition

(x) Keith, *The British Cabinet System, 1830—1938*, pp. 332 ff.

in 1929 was due to extremist feeling, not to any demerit (*y*). Criticism is based on (1) the severance of close contact between electors and members in single-member constituencies, which is the essential feature of the present system; (2) the growth in the power of party organisations to suggest and co-ordinate candidatures; (3) the increase in control by the organisations over the members. (4) the possibility of the presence in the Commons of small groups which would complicate the question of a strong government; (5) the risk, even if no such development takes place, of weak governments owing to party membership according with numbers of voters. Irish Free State experience suggests this result, but the 1938 election in Eire gave a decisive majority to Mr. de Valera. Numbers, it is argued, are not conclusive; governments do not mistake numbers for unbounded authority, and would not act very differently under the proposed system from their present position (*z*).

The system demands multi-member constituencies, five being a convenient number, large enough to give a wide but not too confusing a choice, and the use of the transferable vote, the elector marking the candidates' names in order of his preference. Any candidate who obtains the quota given by adding one to the number reached by dividing the total votes cast by the electors by one more than the number of seats is elected and his surplus votes are transferred to yet unelected candidates in order of the preferences expressed; any candidate who thus attains the quota is elected. The process is completed by eliminating the lowest candidate and so on. The complexity of counting affects only the enumerators, and no larger number of spoiled votes is necessary, though rather absurdly in the University contests the number of spoiled papers is excessive.

### *Privileges of the House of Commons.*

**The List of Privileges.**—Certain privileges are claimed by the Speaker at the beginning of each Parliament as the "ancient and undoubted rights" of the Commons, which the Lord Chancellor on behalf of the Crown "most readily confirms." These and other rights may be grouped under two heads. (1) Those demanded of the Crown by the Speaker of the House of Commons at the commencement of each Parliament and granted as a matter of course (*a*). These are—

- ✓(a) Freedom from arrest (claimed in 1554). ✓
- ✓(b) Freedom of speech (claimed in 1541). ✓
- ✓(c) The right of access to the Crown (claimed in 1536). ✓
- (d) The right of having the most favourable construction placed upon its proceedings. ✓

(*y*) Mansergh, *Government of Northern Ireland*, pp. 127 ff.

(*z*) Finer, *Modern Government*, ii. 911—925; May, *Const. Hist.*, iii, 55—59; P. R. Pamphlets, Nos. 66—74. For the Free State, see Mansergh, pp. 70—73.

(*a*) At first the Speaker claimed privileges for himself only in his communication of the wishes of the House, *e.g.*, under Henry IV. The custom of demanding the ancient privileges of the Commons dates from 14 Hen. VIII. On the subject, see May, *Parl. Pract.* (ed. 1924), pp. 70 ff.; Tanner, *Tudor Const. Doc.*, p. 551; *Const. Doc. of James I.*, pp. 382 ff.

(2) The second group comprises those not demanded by the Speaker. These are—

- ✓(a) The right to provide for the due composition of its own body.
- ✓(b) The right to regulate its own proceedings.
- ✓(c) The right to exclude strangers.
- ✓(d) The right to prohibit publication of its debates.
- ✓(e) The right to enforce observation of its privileges by fine, imprisonment, or expulsion,

**Origin and Character.**—The privileges represent those powers and rights which were felt to be necessary by an early assembly for the protection of itself and its members. The judicial powers which Parliament came to exercise added to its position, as the royal courts were eager and ready to magnify their own authority and to punish by their own discretion all who seemed to hold it in disrepute. The King was not as a rule unwilling to support the claims of the Commons, and in the eighteenth century they assumed an attitude of self-assertion that went far beyond the needs of the case. The more modest rules of to-day reflect the result of the reform of 1832, which made the Commons once more responsive to public opinion, as opposed to an oligarchy.

**Freedom from Arrest.**—This privilege can be traced to Anglo-Saxon times, when those on their way to the Gemot were in the King's peace, and was repeatedly recognised by the Kings, the exception in *Thorpe's Case* (b) being due to his Lancastrian connections. At first it was exercised by Act when a member was imprisoned after judgment in execution, and by writ of privilege on arrest on mesne process; but in *Ferrer's Case* (c) they asserted the right themselves to act by their serjeant. *Shirley's Case* (d) resulted in a statutory assertion of the privilege by 1 Jac. I. c. 13, which indemnified keepers of prisons for release on the score of privilege, and allowed suit after expiry of privilege. It still exists during, and for forty days (e) before and after, a session of Parliament, even after a prorogation or a dissolution, and the rule applies to a person who was a member of the old Parliament, but is not a member of the new one (f). Formerly, it extended to the servants of members also, distress of goods was forbidden in both cases, and in addition no action could be commenced against a member or his servant during the same period. This proved the source of great hardship and delay to suitors, action during a dissolution, prorogation or adjournment for more than 14 days was allowed by 12 & 13 Will. III. c. 3; and it was finally enacted by 10 Geo. III. c. 50, s. 4, that any

(b) (1453), Rot. Parl., v, 239, 240.

(c) (1543), Tanner, Tudor Const. Doc., pp. 580—583. The servant's privilege was asserted in *Smalley's Case* (1576), *ib.*, pp. 584, 585.

(d) See Prothero, Select Stat., pp. 254, 255, 320—325. The demand of the Commons was refused by the Warden of the Fleet, who was then committed to prison and released only after Shirley's release.

(e) The period of forty days corresponds with the length of summons provided by Magna Carta.

(f) *Goudy v. Duncombe* (1847), 1 Exch. 430; and see *Re Anglo-French Co-operative Society* (1880), 14 Ch. D. 533.

action could be commenced at any time against members or their servants, that no process was to be stayed by reason of privilege, but the persons of members were to be privileged from arrest and imprisonment. The privilege in favour of members' servants is thus impliedly revoked, though not formally abandoned until August, 1892. Even as regards members the abolition of arrest on mesne process in 1838 (*g*) took away most of the value of the privilege. Privilege for goods of members was not claimed after 1856. In bankruptcy a member has under the Bankruptcy Act, 1914 (s. 128), no exemption from the normal course. But it still serves to release from prison on a charge of misdemeanour a person elected while in prison (*h*).

The privilege does not exist in the case of treason, felony, or breach of the peace; and, in spite of a decision of the Common Pleas in *Wilkes' Case* (*i*), it was resolved by both Houses that the privilege should not extend to seditious libel. In *Mr. Long Wellesley's Case* (*k*), the committee of privileges decided that it should not extend to cases of criminal contempt of court, and no action was held necessary when Mr. Whalley was committed for contempt in the *Tichborne Case* on January 23, 1874, but almost at once released (*l*).

**Freedom of Speech.**—This was always claimed by the House as their ancient right, and vindicated in the cases of *Haxey* (1397) and *Strode* (1512) in Parliament (*m*), but was frequently violated under the Tudors (*n*) and Stuarts by an undue extension of the prerogative. Whether the Lord Keeper said so or not in 1593, Queen Elizabeth evidently held that measures reforming and transforming the Commonwealth should only proceed from her initiative with her Council and that the Commons' right was to say *aye* or *no* to legislation or taxation, and to advise when consulted on policy. The last instance of direct proceedings against members for words spoken in Parliament was *Eliot's Case* (1629) (*o*), where judgment in the King's Bench was obtained against Sir John Eliot, Denzil Holles, and Benjamin Valentine for seditious speeches in Parliament. This judgment was, however, declared to be illegal and against the privileges of Parliament by a resolution of both Houses, and was subsequently reversed on writ of error by the House of Lords (*p*). It

(*g*) 1 & 2 Vict. c. 110, s. 1.

(*h*) 74 Com. Journ. 44; 75 *ib.* 230.

(*i*) (1763), 19 St. Tr. 982; 29 Com. Journ. 689; Parl. Hist., xv, 1362—1378.

(*k*) (1831) 86 Com. Journ. 701.

(*l*) 218 Hansard, 3 s., 52, 108.

(*m*) Rot. Parl., iii, 434; 4 Hen. VIII. c. 8. It is uncertain if Haxey was a member of the Commons, though he may have attended as a clerical proctor: Stubbs, Const. Hist., ii, 516.

(*n*) Elizabeth forbade discussion of religious issues (1571, 1581, 1587 and 1593), though she relaxed her prohibition in 1597, and resented questions of the succession being raised: Tudor Const. Doc., pp. 555 ff.; Neale, Tudor Studies, p. 257. James I. bitterly rebuked the Commons for their expression of views on his Spanish marriage policy, and tore out from the Journals of the Commons their protestation against his views: Const. Doc. of James I., pp. 274—276, 279, 288.

(*o*) (1629), 3 St. Tr. 294. Cf. *Sir E. Sandys' Case* (1621), Prothero, Select Stat., p. 310.

(*p*) 9 Com. Journ. 19—25. 12 Lords Journ. 166, 233. There was also involved an assault on the Speaker, but that was disposed of by the ruling that it was combined with the charge of seditious speech: 3 St. Tr. 294.

was finally enacted by the Bill of Rights (g) "that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament." This prohibition was easily evaded by the Crown, which endeavoured to control Parliament by depriving members of some post or office for acting in opposition to its wishes, as in 1764, when General Conway was dismissed from his post as colonel of a regiment in consequence of having opposed Grenville's ministry (r). Not less serious was the King's personal pressure on members by threatening, as in 1801, to regard as a personal enemy any supporter of Catholic emancipation (s). Since that date the question of outside influence has not arisen, the House itself, however, retaining the right to control by censure, suspension, commitment, or expulsion undue licence of speech on the part of its members. Its right, however, does not extend to prevent attacks on private persons, who are thus exposed to risk of serious libel in Parliamentary reports without redress. Attacks on officials are improper, for the Minister must be held responsible for their lapses (t), as in the case of Sir John Simon's Regency Bill, 1937.

**The Official Secrets Acts.**—A very curious issue arose in 1938 through the action of the Army Council seeking to examine before a court of inquiry Mr. Sandys, on account of certain information having been obtained by him regarding the defects of London anti-air raid defences. He had based on it inquiries to the Secretary of State, and the Attorney-General seems to have thought it proper to hint a threat of penal consequences to Mr. Sandys if he did not, under the Official Secrets Act, 1920, reveal the source of his information. A Select Committee, on the issue of the Official Secrets Acts, reported unfavourably on the Attorney-General's unwise action, and it was agreed that there had been a breach of privilege in sending a summons to Mr. Sandys (u). The further issue of what use members can make of information supplied contrary to the letter of the Acts was left over for a second investigation in 1939.

**The Right of Access to the Crown.**—This right may be exercised by the House collectively through the medium of the Speaker. There is no right of individual access as in the case of the House of Lords; but it belongs individually to all such members of the Lower House as are privy councillors just as much as to the peers, who are the hereditary advisers of the Crown.

**The Right of having the most Favourable Construction placed upon its Proceedings.**—This exists as a matter of courtesy, and is essential, as would be the case between ordinary business partners, to the harmonious co-operation of the Crown in its relations with the other members of the legislature.

(g) 1 Will. & Mar. sess. 2, c. 2.

(r) May, Const. Hist., i, 20, 28—30.

(s) *Ib.* i, 64.

(t) 319 H. C. Deb. 5 s. 1810, 1812.

(u) H. C. Pap. 173, 1938; Committee of Privileges report accepted July 11 and 19, 1938.

**The Right to provide for its Due Composition.**—This comprises:  
(a) The right of the Speaker to secure the issue of a new writ on a vacancy occurring during the existence of a Parliament (*x*), either by operation of some disqualification or on the decision of a member elected in more than one place which seat he will accept. If in session, the writ is issued in accordance with the order of the House. If not in session, the procedure is regulated by certain statutes (*y*).

(b) The right to determine questions as to the legal qualifications of its own members, as in *Smith O'Brien's Case* (1849), *O'Donovan Rossa's Case* (1870), *Mitchel's Case* (1875), *Michael Davitt's Case* (1882), and *A. A. Lynch's Case* (1903), these persons being disqualified as undergoing sentence in consequence of conviction for felony or treason.

In *Mitchel's Case* the House declared the seat vacant, but on his being elected a second time they allowed the courts to determine the question, and it was held that the votes given to Mitchel were thrown away and his opponent at the election duly elected in consequence (*z*). In *Michael Davitt's Case* the House resolved that the election was void, and a new writ was accordingly issued (*a*). Mitchel's Case

(c) The right to expel a member although subject to no legal disqualification. So, in 1621, Sir R. Floyd was expelled merely because he was a holder of the monopoly of engrossing wills (*b*). Thus, a member guilty of misdemeanour does not forfeit his seat, but may be expelled, thus vacating his seat. Or the House may itself decide that a member's acts merit expulsion, as in the case of Sir R. Steele's pamphlet, *The Crisis*, in 1714, and of Wilkes' *North Briton* (No. 45) in 1763. In *Wilkes' Case* (1769), Wilkes having been expelled and re-elected, the House passed a resolution declaring his election void, and the member next on the poll duly returned (*c*). In 1782 the House declared this resolution void, as being subversive of the rights of the electors, and the proceedings in connection with the election were expunged from the journals (*d*). The proper course in such a case would therefore be for the House to expel the member a second time, if so disposed. In Upper Canada Mr. Mackenzie was thus four times expelled in the Parliament from 1832. Wilkes' Case

(d) Formerly the House claimed from the reign of Elizabeth and exercised the right to determine questions of disputed elections, notably in the *Case of the County of Norfolk* (*e*) and that of *Goodwin and Fortescue* (*f*), when James I. virtually had to admit their right,

(*x*) He addresses a warrant to the Clerk of the Crown in Chancery, or for Northern Ireland the Clerk of the Crown.

(*y*) On death or peerage, 24 Geo. III. c. 26; on acceptance of office, 21 & 22 Vict. c. 110; on bankruptcy, 46 & 47 Vict. c. 52, s. 33; formalities, 26 & 27 Vict. c. 20.

(*z*) See 130 Com. Journ. 235; I. R. 9 C. L. 217; Monypenny and Buckle, *Disraeli*, ii. 713 f.; 222 Hansard, 3 s. 511.

(*a*) 137 Com. Journ. 140.

(*b*) 1 Com. Journ. 565—67.

(*c*) 32 Com. Journ., 228, 229, 385—386, 387; May, Const. Hist., i, 309—326.

(*d*) 38 Com. Journ. 977. Walpole's re-election in 1712 had been declared void: Parl. Hist., vi, 1071. In 1814 Lord Cochrane, expelled on conviction, on re-election for Westminster, was not re-expelled.

(*e*) (1586), Tanner, Tudor Const. Doc., pp. 595, 596.

(*f*) Parl. Hist., i, 993—1017; Gardiner, Hist., i, 167—170; Tanner, Const. Doc. of James I., pp. 202—217.

which was repeatedly later recognised by the courts (*g*). Earlier the writs of returns had been examined in Chancery by the King and the Lords, the writs under an Act of 7 Hen. IV. being returned there; James I. still claimed a concurrent right for Chancery, but it was not later asserted. Petitions were referred first to a committee of privileges and elections, then (1672) to a committee of the whole House, then from 1727 to the House itself, and in 1770 to a select committee (*h*). In 1868 the trial of disputed elections was handed over to the law courts by statute (*i*), despite strong judicial protests, based on the fact that judges would be exposed to allegation of political bias as has indeed been the case. The election petition having been tried by two judges of the High Court, no appeal lying save by leave of the court, the result is intimated to the Speaker, and the House either confirms the election or orders a new writ to be issued.

The rules as to *corruption* and *illegal practices* are statutory (*k*); the latter include payments in excess of the scale of expenditure laid down by statute (*l*), voting more than twice (*m*), payments not authorised by the candidate's agent (*n*), false statements as to the character of the candidate (*o*), and endeavouring to break up political meetings (*p*). Personal implication in a corrupt practice voids an election and disqualifies the candidate for ever sitting for that constituency, or for seven years elsewhere; innocent action excludes for seven years from the constituency unless no blame is held to attach. Guilt of illegal practices voids an election and disqualifies for seven years; if the offence is without the candidate's privity, he cannot sit for that constituency in that Parliament. Bribery became rampant under Charles II., was practised on a generous scale by George III., and was not lessened by the Reform Act; a long series of Acts (1841, 1842, 1852, 1854 and 1868) was needed to reduce it within moderate limits. But even in 1876 a Norwich and Boston Corrupt Voters Act was necessary. The Ballot Act in 1872 diminished its prevalence.

**The Right to regulate its own Proceedings.**—Within certain limits either House has the exclusive right to discuss and adjudge matters arising in that House, and, except in the case of a criminal offence, the courts will not interfere.

In the case of *Bradlaugh v. Gossett* (*g*), the plaintiff complained

(*g*) *Barnardiston v. Soame* (1674), 6 St. Tr. 1092; (1689), *ib.* 1119; *Onslow's Case* (1680), 2 Ventris, 37; *Prideaux v. Morris* (1702), 2 Salk. 502.

(*h*) Walpole's government was forced to resign by loss of the Chippenham election case in 1742, such issues being decided on purely party lines. The 1770 reform (10 Geo. III. c. 16) provided for the selection of 49 members by lot, their reduction to 13 by alternate challenges, and the addition of one member by either party. It was authorised to administer an oath. See also 4 & 5 Vict. c. 58; 11 & 12 Vict. c. 98.

(*i*) 31 & 32 Vict. c. 125; and see 46 & 47 Vict. c. 51; 15 & 16 Geo. V. c. 49, s. 67; on appeal, s. 31 (1) (*j*).

(*k*) 46 & 47 Vict. c. 51.

(*l*) 7 & 8 Geo. V. c. 64, s. 33, Sch. 4.

(*m*) 7 & 8 Geo. V. c. 64, s. 32; 18 & 19 Geo. V. c. 12, s. 3, Sch.

(*n*) 7 & 8 Geo. V. c. 64, s. 34.

(*o*) 58 & 59 Vict. c. 40, s. 1.

(*p*) 8 Edw. VII. c. 66, s. 1 (1), (2).

(*q*) (1884), 12 Q. B. D. 271. The impropriety of the Commons' action is pointed out by May, Const. Hist., iii, 222—227. In January, 1891, the Commons expunged the resolutions of expulsion.

*Bradlaugh v. Gossett*  
Case.

that, having been duly elected member for Northampton, the House, by passing a resolution excluding him from the House, had prevented his taking the oath required by the Parliamentary Oaths Act, 1866 (*r*). He asked the court to declare the order of the House to be void, and to restrain the Serjeant-at-Arms from carrying it into effect. The court held that "the House of Commons has the exclusive power of interpreting the statute so far as the regulation of its own proceedings within its own walls is concerned; and that, even if that interpretation should be erroneous, this court has no power to interfere with it, directly or indirectly" (*s*). The authority of this case was adduced in order to justify the refusal of a magistrate to issue a summons against members of the House's Committee for selling liquor without a licence (*t*), though it was also doubted by Avory, J., if the Licensing (Consolidation) Act, 1910, could be applied to the House (*u*).

Where a member disobeys the Speaker or Chairman or Deputy Chairman in committee or is guilty of obstruction or behaves objectionally, *e.g.*, by insulting either House or any member or speaking irreverently of the King or using his name to influence debate, which is forbidden, the Speaker or Chairman may be asked to name him. The question of suspension is then put, the Speaker resuming the chair if necessary, without debate or amendment being allowed, and if carried the member is suspended for five days for a first offence, twenty for a second, and for any further offence until resolution of the House; if force is necessary, suspension continues to the end of the session (*x*).

**The Right to exclude Strangers.**—This right exists for two reasons. (1) That no stranger may be present and counted in a division, as actually occurred on one occasion in 1771 (*y*). (2) In order to prevent outside influence—formerly especially that of the King—through the speeches and actions of members being reported to the outside world. It is characteristic of the mentality of the eighteenth century that both Houses were most reluctant to have their proceedings revealed fully; and carried their doctrines to the extent at times of mutual exclusion (*z*).

On any member who is dissatisfied with the presence of strangers taking notice of the same, the Speaker or the Chairman (if the House is in committee) is bound by a resolution of the House passed in 1875 (*a*) forthwith to put without amendment or debate the question "that strangers be ordered to withdraw"; or the Speaker or Chairman may order their withdrawal at any time on his own initiative. Thus the ladies' and strangers' galleries were kept closed in 1908—09 on

(*r*) 29 & 30 Vict. c. 19.

(*s*) Judgment of Stephen, J., at p. 280. He makes it clear (p. 283) that criminal acts proper are not beyond jurisdiction.

(*t*) *R. v. Graham-Campbell; Herbert, Ex parte*, [1935] 1 K. B. 594.

(*u*) Contrast *Williamson v. Norris*, [1899] 1 Q. B. 7, 12, *per Russell, L.C.J.*

(*x*) Standing Order No. 17 as laid down in 1933.

(*y*) 33 Com. Journ. 212.

(*z*) Turberville, *House of Lords in Eighteenth Century*, pp. 16—18.

(*a*) The practice is now regulated by Standing Orders Nos. 87, 88, 89. Prior to 1875 the Speaker had to order withdrawal on a member calling attention to the presence of strangers.

account of the agitation for female suffrage and in 1920 to avoid risk of demonstrations on the issue of Ireland. Members of the Lords are not included in exclusion under the Standing Order (b).

**The Right to prohibit Publication of Debates.**—A journal of the work done in the Commons dates from 1547, but, while short notes of speeches originally might appear, this by order of the Long Parliament ceased in 1641. Both Houses have frequently declared by resolution that the publication of debates constitutes a breach of privilege. The Long Parliament forbade publication, and under Walpole's guidance in 1738 the prohibition was reinforced (c). Thereafter in such accounts of debates as did appear members were represented, e.g., by Dr. Johnson in the *Gentleman's Magazine* in 1740—43, under fictitious names, though from 1680 the House ordered publication of its votes and proceedings without debates by direction of the Speaker. In 1771 when daily journals began to issue inaccurate reports and to give with unfavourable comment the names of speakers, the House sent a messenger to arrest one Miller, a printer of Parliamentary debates; the printer, however, gave the messenger into custody for assault, and the Lord Mayor and two aldermen (Wilkes and Oliver) committed him for trial, allowing him bail. Upon this the House caused the entry to be erased from the book of recognisances, and committed the Lord Mayor and two aldermen to the Tower (d). Owing to the strong feeling aroused, the House has, since that date, waived the right to restrain publication of its debates, which are, however, still permitted upon sufferance only, and in case of wilful misrepresentation the House would still exercise the right to punish the offender. During the war in 1916 by a regulation (27A) under the Defence of the Realm Act the publication or even reference to any proceedings of secret sessions then occasionally held was penalised.

In 1835 cheap sale of Parliamentary papers was ordered, in 1836 the issue of division lists, and in the new Houses of Parliament space for reporters was assigned, all tokens of the spirit of the Reform Act in its admission of the responsibility of the Commons to the people.

A new issue was thus raised. It was clear that statements otherwise giving grounds for a libel action were immune if contained in a petition circulated only to members of Parliament (e). But what if allegations of libellous character were contained in papers ordered to be printed and published? It was ruled in *Stockdale v. Hansard* (f) that no privilege attached, and the issue had to be cleared up by an Act (g), which creates the order of either House authority rendering action for libel invalid. This did not cover publication without express order of either House. But in *Wason v. Walter* (1868) (h), it was held that

(b) Standing Order No. 89.

(c) Parl. Hist., x, 811.

(d) See May, Const. Hist., i, 336, 337.

(e) *Lake v. King* (1667), 1 Wms. Saund. 131. Cf. *Dillon v. Balfour*, 20 L. R. Ir. 600; no action lies for words in Parliament.

(f) (1839), 9 A. & E. 1.

(g) 3 & 4 Vict. c. 9. The publication without malice of a fair abstract of a Parliamentary paper is privileged under s. 3: *Mangena v. Lloyd* (1908), 99 L. T. 824; *Mangena v. Wright*, [1909] 2 K. B. 958.

(h) (1868), L. R. 4 Q. B. 73. Cf. *Davison v. Duncan* (1857), 26 L. J. Q. B. 104, as to a member's right to publish a speech for information of constituents.

faithful and fair reports of Parliamentary proceedings, although containing matter disparaging to individuals, are privileged, though the publication of a particular speech *malâ fide*, with the object of damaging an individual, would not be privileged (i). Since that decision it has been more generally enacted (44 & 45 Vict. c. 60) that fair and accurate newspaper reports of the proceedings of public meetings, published without malice and for the public benefit, are privileged.

**The Right to enforce its Privileges.**—This the House may do by admonition, reprimand, commitment to the custody of the Serjeant-at-Arms or to prison, fine—but this is obsolete, none having been imposed since 1666 though the idea was mooted on April 7, 1892, in respect of the action of railway directors in dismissing a servant for evidence given to a Committee (k)—or expulsion if the offender is a member.

The House of Commons (unlike the House of Lords) cannot commit for a fixed term, but only until prorogation or dissolution, when the prisoner would be entitled to his discharge upon writ of *habeas corpus*. The power to commit is inherent in the right of the House to secure its dignity (l) apart from the technical issue as to its claim to be a Court of Record, favoured by Coke (m).

Is there any limit to the cases in which the House can commit? Can the courts release by *habeas corpus* persons committed on grounds inadequate to justify action? In early times, as *Floyd's Case* (n) and *Mist's Case* (o) show, the House assumed the right to punish regardless of any real breach of privilege. In *Murray's Case* (p) the King's Bench refused to intervene, as his committal was alleged to be for contempt, and the judges and the House of Lords affirmed this doctrine in *Burdett v. Abbot* (q), and, though the courts and Commons were in conflict, it was held in the *Case of the Sheriff of Middlesex* (r) that it is sufficient if the warrant expresses the commitment to be for contempt, and the court will not go behind that to inquire what the contempt actually was. But, if the warrant does not profess to be for contempt, but for some other matter, the court could on one view inquire into the legality or otherwise of the commitment (s).

**Control of Privilege by the Courts.**—While the courts will not interfere with commitments for contempt, they do not admit the right to define its privileges as inherent in the Commons, so as to compel

(i) Cf. *R. v. Creevey* (1813), 1 M. & S. 273.

(k) See Witnesses (Public Inquiries) Protection Act, 1892 (55 & 56 Vict. c. 64).

(l) *Burdett v. Abbot* (1811), 14 East, 1, 152, per Lord Ellenborough.

(m) 1 Com. Journ. 604; cf. *Fielding v. Thomas*, [1896] A. C. 600, 612, on the position of the Assembly of Nova Scotia as a Court of Record.

(n) (1621), Prothero, Sel. Stat., pp. 337—339; Tanner, Const. Doc. of James I., p. 319.

(o) (1721), Hallam, Const. Hist., ii, 379.

(p) (1751), 1 Wils. 299.

(q) (1811), 14 East, 1.

(r) (1840), 11 A. & E. 273. The Sheriff had been committed by the House for contempt in having levied execution upon Hansard consequent upon the judgment in *Stockdale v. Hansard* (1839), 9 A. & E. 1. Cf. *Howard v. Gosset* (1847), 6 St. Tr. (N. S.) 319.

(s) Per Lord Ellenborough, C.J., in *Burdett v. Abbot* (1811), 14 East, at p. 150, adopted in the *Case of the Sheriff of Middlesex*, *u.s.*

them to accept its pronouncements. ✓ *Ashby v. White* (t) was an action brought by an elector against a returning officer who had refused to allow his vote, to which he was, in fact, legally entitled. The House of Commons resolved that Ashby was guilty of breach of privilege in having applied to the court for relief rather than to the House of Commons. The Queen's Bench upheld this view, and decided that Ashby had no cause of action; this decision was, however, reversed on writ of error by the House of Lords. A dispute ensued between the two Houses, and in the meantime five other Aylesbury men, having brought similar actions, were committed by the House of Commons for contempt, and, on suing out a writ of *habeas corpus*, it was held by three judges to one that, the Speaker's warrant having been expressed to commit for contempt, the court could not go behind that and inquire what the contempt was (u). The persons aggrieved asked the issue of a writ of error from the House of Lords, the Commons protested to the Queen against the grant of the writ, while the Lords urged that the writ was of right. The Commons, it must be remembered, had the ground that writs of error were disposed of in the Lords by the general vote, and not on merely legal grounds by legal lords. The Queen prorogued Parliament, thus avoiding the need to issue the writ, but releasing the persons committed. In fact the Lords did not thereafter interfere in such issues (x).

In *Stockdale v. Hansard* (y) privilege was claimed for libellous matter published by order of the House. It was held that the House could not, by its resolution, alter the law of the land so as to legalise an otherwise illegal act; and further, that a resolution of the House declaring its privilege would not prevent the court from inquiring into the validity or otherwise of such privilege (z). A bitter controversy ensued, the Commons seeking to penalise all minimising their privilege but the issue, as seen above, was terminated by the passing of an Act in 1840. In the case of oversea territories, the right to examine privileges claimed has since this case been repeatedly asserted by the Courts (a).

So that, though the House in the past has claimed the right to determine its own privileges, it now seems clearly settled that in a proper case the courts have the power to pronounce on the validity or otherwise of alleged Parliamentary privileges.

**Minor Privileges.**—The House of Commons also claims certain other minor privileges, such as exemption from attending as witnesses, which is, however, usually waived, and exemption from service as sheriff.

The question of the latter privilege was discussed in 1904 on the nomination of Major Coates, M.P. for Lewisham, as Sheriff for Surrey. It appeared that a resolution of the House, of January 7, 1689, declared

(t) 2 Ld. Raym. 938.

(u) *R. v. Pate*, known as the *Case of the Men of Aylesbury* (2 Ld. Raym. 1105). The minority was Holt, C.J., who held that, as the contempt was expressed to be what had been held to be a legal right, it could be examined and ruled invalid.

(x) See 14 St. Tr. 695—888.

(y) (1839), 9 A. & E. 1.

(z) See judgment of Lord Denman, C.J., in *Stockdale v. Hansard* (1839), 9 A. & E. pp. 108—148.

(a) *Ex parte Carson* (1842). 4 Moo. P. C. 63.

that a writ nominating a member a sheriff was a breach of the privileges of the House, and doubt was expressed by Lord Alverstone, C.J., whether a privilege of the House could be waived. In the result Major Coates' name was placed third on the list, on the understanding that the matter would be brought forward in the House at an early date (b). The difficulty appears to be avoided in present practice.

**Payment of Members.**—Originally a member of the Commons performed a duty in attendance and was entitled to expenses (4s. a day for knights, 2s. for citizens and burgesses), and this right was enforced by Lord Nottingham against Harwich as late as 1681, but fell into desuetude as a rule with the increased value placed on seats. Now that a member clearly represents the country generally and not merely a locality (c), central payment of £600 a year is allowed and certain travelling expenses to and from his constituency (d), but the old statutes (e), imposing fines for non-attendance, are not re-enacted and attendance cannot be compelled (f). The duty of representation of the community renders unenforceable any contract binding a member to vote as any trade union or other body directs (g). A proposal for pensions for ex-members and wives, if necessitous, by £12 deductions from salary, was carried on February 3, 1939. £150 (£75 for widows) is contemplated.

**The Leader of the Opposition.**—Under the Ministers of the Crown Act, 1937, following a regular practice in the Dominions, there is payable to the leader of the opposition a salary of £2,000 a year. The decision as to which party is to be deemed the opposition under the Act (s. 10) is assigned to the Speaker, who also decides in case of doubt who is the leader. His decision, certified in writing, under his hand, shall be final and conclusive. The amount is charged on the consolidated fund and is not therefore liable to annual challenge in the Commons. It is justified as a recognition that the opposition is His Majesty's (h) and an indispensable element in government, and that its duties involve sacrifice of other modes of livelihood.

(b) See *The Times*, November 14, 1904, p. 13.

(c) Coke, 4 Inst. 14, already accepts this doctrine, so familiar from its wide expression by Burke.

(d) The salary is granted since 1911 by inclusion of provision in the Appropriation Act, and under the Speaker's ruling in 1917 is not paid until the oath is taken. Cf. Oxford, *Fifty Years of Parliament*, ii, 123, 124. It was £400 until 1937, when the increase of minister's salaries led to this increase also. No mandate was asked for, an unsatisfactory omission.

(e) 5 Ric. II. st. 2, c. 4; 6 Hen. VIII. c. 16.

(f) *Hollinshead v. Hazelton*, [1916] 1 A. C. 428; this case decides that it is not contrary to public policy to appropriate for benefit of creditors part of a member's salary under the Bankruptcy (Ireland) Amendment Act, 1872 (35 & 36 Vict. c. 58, s. 51), the Irish law not excluding from election a bankrupt. No call of the House has taken place since 1836. The issue was again raised in 1933 in Northern Ireland consequent on the election of Mr. de Valera, but not pressed, and Mr. de Valera was was not a candidate at the next election.

(g) *Osborne v. Amalgamated Society of Railway Servants*, [1910] A. C. 87.

(h) This aspect is brought out very deliberately by Mr. Disraeli, November 23, 1868, when explaining his decision to remain in the Commons as leader of the party in view of the Queen's comfort and welfare: *Monypenny and Buckle*, ii, 438 f.

## CHAPTER III.

## THE HOUSE OF LORDS.

*Composition of the House of Lords.*

THE House of Lords is composed of the lords spiritual and temporal, and these may be divided into three groups.

✓(1) Hereditary peers of England or the United Kingdom, who are also hereditary lords of Parliament. These are dukes, marquesses, earls, viscounts, and barons.

✓(2) Hereditary peers who are not hereditary lords of Parliament.  
These are—

✓(a) The sixteen representative peers of Scotland.

✓(b) The representative peers of Ireland (a).

✓(3) Lords and peers of Parliament during office or life only. These are—

✓(a) The twenty-six spiritual lords (two archbishops and twenty-four bishops), so long as in office (b).

✓(b) The seven lords of appeal in ordinary, for life. They appear to be peers as well as lords of Parliament.

Thus it will be seen that all peers are not necessarily hereditary lords of Parliament, nor are all lords of Parliament necessarily hereditary peers.

**Number of Peers.**—The number in 1938 was 783, of whom 716 were hereditary, 67 were for life or a term or clerics (10 life peers, 26 clerics, 16 Scots and 15 Irish peers), much exceeding the House of Commons. Twenty-four minors were unable to sit on that score. The number of lay peers in 1454 before the War of the Roses was fifty-six; in 1485 Henry VII. summoned twenty-eight only; Henry VIII. never summoned more than fifty-one, while by the suppression of the monasteries, with the removal of thirty abbots and priors, despite five new sees being created, the spiritual lords fell to twenty-six, which remains their total. Under the Stuarts, 193 new peerages were added, but ninety-nine became extinct, so that in 1688 the total was about 150 (c). In 1704 the muster of

(a) Owing to the creation of the Free State, no vacancies will be filled; see *post*, p. 83. The number was properly 28; on January 1, 1939, there were 12 vacancies, and of the 16 elected, one had received a British barony.

(b) They preserve on resignation rank and precedence: 32 & 33 Vict. c. 111, s. 5.

(c) To Elizabeth's Parliament of 1597, 56 lay peers were summoned; that of Charles I. (1625), 97; in 1661, 142; in 1685, 145. From 1649 to 1660, no lay peers sat in Parliament, the Commons in 1649 having claimed sole authority, but two out of seven summoned took their seats in 1657.

temporal peers was 161; in 1714, 213; in 1728, 221, and in 1759 seven fewer. In 1780 it had risen to 224. With Pitt begins the throwing open of the House to men of wealth, bankers, merchants, nabobs, army contractors, lawyers, soldiers, and seamen, and George III. added 128 new members. By 1850 the number reached nearly 400, by 1900 about 500, and the process has not been retarded by war rewards, and the sale of honours under the coalition and other ministries, with the inevitable result of diminishing the prestige of the peerage, though its attraction to certain types of mind remains very marked. Mr. Asquith's ministry (1908—16) added about ten a year, Mr. Lloyd George's ministry (1916—22) about fifteen yearly, while the former advanced in rank seventeen, the latter twenty-five. Some ten a year is a fair average since in new creations. Naturally the number has been unusually increased by the special grants for the royal Jubilee in 1935 and the Coronation in 1937.

**Origin of the Various Titles.**—The style of *Duke* was used by the Anglo-Saxons as a title of dignity, but does not seem to have been employed by the early Norman kings, who, being dukes of Normandy themselves, probably thought it derogatory to their own dignity to confer a similar title upon a subject. The first dukedom was conferred upon Edward the Black Prince (*d*), who was created Duke of Cornwall by Edward III. in 1337, the title being hereditary and devolving upon the eldest son of the reigning sovereign; a famous non-royal Duke was Buckingham, a creation of James I. There were in 1930 twenty in the Lords, the senior being Norfolk (1483).

*Marquess* was a term which applied originally to the Lords Marchers; it was first used as a title of dignity by Richard II., who created Robert de Vere Marquess of Dublin in 1386 (*e*). There were twenty-eight in the House in 1938, the senior, Winchester (1551).

*Earl* was the equivalent of the Anglo-Saxon Ealdorman, under the Normans rendered as *comes* or count, whence the title Countess. William I. created a few Earls of the older type, but from Stephen's time it connoted no political power as necessarily involved. It was the highest hereditary dignity until the creation of the dukedom in 1337.

*Viscount* was a title borrowed originally from the French, and used for the royal sheriff, whose position had affinities to that of the Norman *vice-comes*. It was first conferred as a title of honour by Henry VI. (*f*), who had been crowned King of France, upon Lord Beaumont, created Viscount Beaumont. It is the rank regularly conferred on ex-Speakers and Secretaries of State.

**The Baronage.**—The early history of the baronage is involved in some obscurity; originally, on one theory, the term "baron" as equivalent to lord of a manor, applied to all who held as tenants *in capite* under the Crown (*g*); it is also suggested that it is the

(*d*) Selden, Tit. Hon., p. 751.

(*e*) Selden, Tit. Hon., p. 759.

(*f*) Pike, Const. Hist. of the House of Lords, p. 113.

(*g*) See Pike, pp. 87 ff.; Maitland, Const. Hist., pp. 64—66, 78—82.

appellation of those entrusted by William I. with administrative and judicial functions (*h*). It is at least clear that in certain cases, especially in the eleventh and twelfth centuries, there were barons who did not hold direct from the King. It was, however, only the greater barons who had both a civil and criminal jurisdiction in the *court baron*, the lesser barons having civil jurisdiction only.

The distinction between the greater and lesser tenants *in capite* is observed in Magna Carta, the King promising to summon the *maiores barones* by individual writ (*sigillatim*), whilst the other tenants *in capite* were to be summoned through the sheriffs (*i*). It seems that gradually baron came to be restricted to one who held a *baronia* of  $13\frac{1}{2}$  knights' fees.

Baronies were thus often an incident of tenure, and continued such for at least two centuries after the Conquest; the general connection in the contemporary view is shown in the abbots' claim to be excused attendance as they had not land baronies (*k*). They could be alienated with the land, and in 1433 possession of the castle of Arundel was held to confer an earldom (*l*).

Tenure *per Baroniam*, however, never of itself conferred an absolute right to be summoned to Parliament. Thus Edward I. summoned forty-one barons in 1295, ninety-nine in 1300, Edward II. fifty-two in 1322. Nor, as the case of Thomas Furnival under Edward II. proves, was it a condition precedent to a writ of summons, it always in the 13th and 14th centuries remaining open to the King within certain limits to summon whom he pleased, at least from his own tenants, and possibly from those dependent on them (*m*). The idea that the issue of a writ to an individual conferred upon his heirs an hereditary right to be summoned seems, however, to have become generally recognised by the time of Richard II. (*n*).

The question of baronies by tenure was finally settled by the House of Lords in 1861, in the *Berkeley Peerage Case* (*o*), where it was held that the tenure of certain lands could not of itself confer a barony. This decision of course harmonises with the doctrine of the Lords in the 17th century, beginning with a resolution in 1640, that peerages could not be alienated or transferred or surrendered

(*h*) Petit-Dutaillis, *Feudal Monarchy in France and England*, pp. 69, 70. For the barons of London, perhaps the landholders paying part of the civic expenses, see Tait, *Medieval English Borough*, pp. 256—259.

(*i*) See Stubbs, *Sel. Chart.* p. 295. This would include the lesser barons and all other tenants *in capite*: *Magna Carta Comm. Essays*, pp. 46—77.

(*k*) Stubbs, *Const. Hist.*, iii, 459. Baron Berkeley under Henry VII. settled his barony on the King with remainder to his own heirs, which became effective on Edward VI.'s death, when Berkeley's great-grandson was summoned.

(*l*) Pike, p. 80; Palmer, *Peerage Law*, p. 179; cf. *De Lisle Peerage Case*, *ib.* 181; *Abergavenny Peerage Case* (1604), 6 Co. Rep. 78.

(*m*) Pike, *Const. Hist. H. of Lords*, p. 92; Pollard, *Evol. of Parl.*, p. 99.

(*n*) *ib.* pp. 99, 100. See 5 Ric. II. st. 2, c. 4; Lord Redesdale in Nicolas' Report of the *De Lisle Case*, p. 200.

(*o*) (1861), 8 L. H. C. 21; cf. *Fitzwalter Peerage Case* (1669), Collins, 287. In the *Ruthyn Case*, Collins, 256, it had been held that a peerage must originate in a matter of record, a writ or a patent, excluding mere evidence of having sat.

to the Crown, though this occurred in early times (*p*). Up to the time of Henry VIII. a commoner marrying a baroness in her own right became entitled to a summons for her life; Henry VIII. restricted this to cases where there was issue, but down to the *Willoughby Case* (*q*) in 1580 it was held that a tenancy in curtesy existed in a peerage during the father's lifetime.

In the *Clifton Case* (1673) (*r*), it was definitely decided that a writ of summons, followed by taking a seat in the House, confers an hereditary peerage, and in the *Frescheville Case* (1677) (*s*), that a writ of summons alone, not followed by taking a seat, does not confer a peerage.

A peeress in her own right, of whom there are a varying number, never large—at present twenty-one—cannot sit in the House of Lords, notwithstanding that they were occasionally allowed to do so in early times (*t*), and notwithstanding the wide terms of the Sex Disqualification (Removal) Act, 1919. The decision in this case was carried by Lord Birkenhead's advocacy as Lord Chancellor in the Committee of Privileges. But it must be noted that an attempt in the Commons expressly to give the right to sit was rejected by the Lords.

Where a peerage by writ descends to daughters, it falls into abeyance, there being no right of seniority. But the Crown may terminate the abeyance in favour of one co-heir, or it may in course of time become vested in a single descendant of the last holder. Peerages by patent are normally limited to heirs male of the body.

It is not proper for the Crown to refrain from sending a writ to any peer duly entitled. Charles I.'s refusal to summon Lord Bristol in 1626 was not persisted in on protest being made by the Lords (*u*). To deprive the Dukes of Cumberland and Brunswick and Albany of their titles because of war enmity required a Titles Deprivation Act, 1917.

**Creation of Peers.**—Earldoms and other ranks were always conferred by charter or letters patent, but Richard II. was the first monarch to create a barony in that way (*x*). A new hereditary peer is now invariably created by letters patent, followed by a writ of summons to take his seat in the House.

The settled principle upon which the Committee of Privileges acts when it has to consider whether an ancient barony has been established is that a barony, apart from the case of letters patent, can only be established by a royal writ summoning an ancestor to attend a Parliament followed by an actual sitting of such ancestor

(*p*) *Ruthyn Peerage Case* (1640), Collins, 256; *Purbeck Peerage Case* (1678), Collins, 306; Lds. Rep., iii, 26; followed in rejecting Lord Mowbray's claim to the earldom of Norfolk based on a surrender of 1302 in *Norfolk Peerage Case*, [1907] A. C. 10. Permission to bring in a Bill allowing surrender of peerages was refused in the Commons, November 26, 1919: 174 Com. Journ. 376.

(*q*) Collins, 23.

(*r*) Collins, 291; and see the *Hastings Peerage Case* (1840), 8 Cl. & F. 144.

(*s*) Lds. Rep. iii, 29.

(*t*) *Lady Rhondda's Case*, [1922] 2 A. C. 339.

(*u*) 3 Lords Journ. 544.

(*x*) The first baron so created was Lord de Beauchamp, Baron of Kidderminster, in the year 1387: Pike, p. 109; Selden, Tit. Hon., p. 747.

in the Parliament, and such Parliament must have been a Parliament conforming in its more essential characteristics to the model Parliament of 1295 (y).

**Restrictions on Creation of Peers.**—The Crown has the exclusive privilege of creating peers, and can create as many as it pleases, subject to the following restrictions:—

- (1) No new Scots peer may be created, since there is no provision to that effect in the Act of Union, and even if created he could not vote at the election of peers to serve in Parliament, for no vote may be given in respect of any peerage in virtue of which no vote has been cast since 1800 (z).
- (2) By the Act of Union with Ireland (a) the Crown might create one new peer of Ireland for every three that became extinct after the date of the union, but in order to keep the number of Irish peers who were not hereditary lords of Parliament up to the number of 100, one new peer might be created for every vacancy occurring below that number. The creation of such peers seems in abeyance.
- (3) It is doubtful whether the Crown can create peerages with limitations which would be void in ordinary law. Thus in the *Devon Peerage Case* (b) an earldom granted to a man and his heirs male was held to be good, and to entitle the heir male of a collateral branch to succeed, whilst in the *Wiltes' Case* (c) a similar grant was held to be bad, and the same doctrine appears in the *Buckhurst Peerage Case* (d), where an attempt to provide that a barony, if it fell to the Earl de la Warr, should shift to the next in succession, failed to stand. The fact, however, that a peerage by writ of summons descends to the heirs lineal, and not to the heirs general, which is a form of descent not otherwise known at law (e), might form an argument in favour of the Crown's power to make such a grant. The Crown can certainly create peerages with special remainder, e.g., to a brother, on the death of the grantee as in the case of the Earl of Balfour, but this takes effect by way of a new grant.
- (4) In the *Wensleydale Peerage Case* (1856) (f), it was held that the Crown had no power to create life peerages with a right to

(y) *Beauchamp Barony, In re*, [1925] A. C. 153. The Parliament of 1290 is not a proper Parliament: *St. John Peerage Case*, [1915] A. C. 282. See Wilkinson, *Studies in Const. Hist.*, pp. 42 f.

(z) 10 & 11 Vict. c. 52.

(a) 39 & 40 Geo. III. c. 67, s. 4.

(b) (1831), 2 Dow & Cl. 200.

(c) (1869), L. R. 4 H. L. 126.

(d) (1876), 2 App. Cas. 1.

(e) Coke, as cited by Cruise on Dignities, p. 100; Pike, *Const. Hist. H. of Lords*, p. 124.

(f) (1856), 5 H. L. C. 958; and see May, *Const. Hist.*, i, 195—201. There had been cases of life peerages with writs of summons from Richard II. to Henry VI. But most cases of life peerages had been either (1) of women, mistresses of the Stuarts and the first two Georges, (2) of peers holding a lower hereditary rank, or (3) where it was expressly provided that they should not sit in Parliament; Stubbs, *Const. Hist.*, iii, 454 f.; 140 Hansard, 3s, 335.

sit in the House of Lords. Such grants are therefore void so far as the right to a writ of summons is concerned. Nor can the Crown create a peerage for a term of years less than life.

Subject to these restrictions the Crown may create an unlimited number of peerages, and might thus ensure the passing of any measure by the House of Lords. This was successfully accomplished by Anne in 1712 in the case of the Treaty of Utrecht (*g*). In 1719 a Peerage bill restraining the creation of peers was brought in by Lord Sunderland. This measure, which would probably have ensured the ultimate destruction of the peerage, was carried by the House of Lords, but thrown out by the Commons (*h*) and no statutory restraint has since been attempted.

Summoning peers is forbidden in the case of aliens unless naturalised (*i*), and of bankrupt peers (*k*). Peers, even if summoned, cannot sit if infants (*l*), if convicted of felony and sentenced to penal servitude, hard labour, or twelve months' imprisonment (*m*) or if expelled by the Lords on impeachment (*n*) or presumably on trial for treason or felony. The Lords have since 30 Car. II. st. 2, c. 1, been compelled to take the same oaths as the Commons.

**The Irish Representative Peers.**—By the Act of Union (1800) (*o*), the number of Irish representative peers was fixed at twenty-eight, and they were elected for life. The procedure on occurrence of a death or attainder was by writ from the Lord Chancellor to the Chancellor of Ireland, directing issue of a writ by the clerk of the Crown to each peer with a form attached to be filled up within fifty-two days and returned to the clerk, who sent the returns to the clerk of Parliaments; in case of equality of votes the clerk drew out one name by ballot (*p*). Questions of disputed peerages fall to the House of Lords to decide (Standing Orders, Nos. 83—91), but in view of the consideration next to be mentioned, the procedure is obsolete.

The abolition of the office of Lord Chancellor of Ireland has terminated the possibility of keeping Irish representation in being. Those already existing receive writs of summons for each Parliament.

**The Scots Representative Peers.**—By the Act of Union, 1707 (*q*), the number of Scots representative peers is fixed at sixteen, and they are elected for each Parliament. The mode of election prescribed by statute (*r*) is as follows:

Whenever a new Parliament is summoned a proclamation is issued under the Great Seal commanding all the peers in respect of whose

(*g*) Pike, p. 363. For 1910—11, see p. 103, *post*.

(*h*) *Ib.*; Turberville, House of Lords in Eighteenth Century, pp. 169—185.

(*i*) 12 & 13 Will. III. c. 2, s. 3, amended by 4 & 5 Geo. V. c. 17, s. 3 (1).

(*k*) 34 & 35 Vict. c. 50, s. 8; 4 & 5 Geo. V. c. 59, s. 106 (1). They could not sit or vote if summoned; Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 32.

(*l*) Standing Order, May 22, 1685 (No. 12).

(*m*) 33 & 34 Vict. c. 23, which abolishes the corruption of blood formerly produced by conviction.

(*n*) *Earl of Middlesex's Case* (1624), 3 Lords Journ. 382.

(*o*) 39 & 40 Geo. III. c. 67, s. 4.

(*p*) *Ib.* s. 8.

(*q*) 6 Anne, c. 11.

(*r*) 6 Anne, c. 78. Amended by 14 & 15 Vict. c. 87.

peerages a vote has been recorded since 1800 (s) to assemble at Edinburgh. The election takes place at Holyrood, and each peer, having taken the oath of allegiance prescribed by the Act, votes for the sixteen peers whom he desires to be elected. The only method to challenge the right of any person who claims to be a peer and answers to a peerage on the roll is by protest made by two peers; the proceedings then go to the clerk of the Parliaments, and if the matter is taken up in the House referred to the Committee of Privileges. A certificate of the peers elected is then made out by the lord clerk register and sent to the clerk of the Crown in Chancery; this certificate is evidence of their title, and no writs of summons are issued. The certificate is read at the opening of Parliament after the Lord Chancellor has been sworn. Cases of disputed claims to vote are under 10 & 11 Vict. c. 52, to be settled by the House of Lords. As by the Act of Union the right to sit in the House of Lords otherwise than as representative peers was specially excepted from the privileges to be enjoyed by Scots peers (t), it was held by the House of Lords in the *Duke of Hamilton's Case* (1711) that a peerage of the United Kingdom (in this case that of Brandon) did not carry with it a right to a writ of summons as an hereditary lord of Parliament (u). This decision was, however, reversed in 1782, the House of Lords having obtained the unanimous opinion of the judges (x), and the Duke of Hamilton's claim to sit allowed. In 1787, the Duke of Queensberry and the Earl of Abercorn having been created peers of the United Kingdom, the House of Lords resolved that they ceased to sit as representative peers (y), thus creating vacancies which have to be filled by a new election. It appears, however, that in the Parliament of 1886—92 this was not acted on (z). No doubt ultimately there will be no more Scots peers than seats to be filled in view of the grant of United Kingdom peerages to Scots peers; on December 31, 1933, of eighty-five Scots peers, sixty-three were members of the House; on the Union roll of 1707 there were 154. In 1939 only twenty-nine Scottish peers without United Kingdom peerages were recorded.

**The Spiritual Lords.**—The Crown's right of summoning bishops is limited to twenty-six, of whom five must consist of the archbishops of Canterbury and York and the bishops of London, Durham and Winchester (a). The mode of appointment of bishops is regulated by a statute of Henry VIII. (b). On a vacancy occurring in an archbishopric or bishopric, the dean and chapter notify the fact to the clerk of the Crown in Chancery, and the King, who acts on the

(s) 10 & 11 Vict. c. 52.

(t) 6 Anne, c. 11, s. 23.

(u) 19 Lords Journ. 346; Turberville, House of Lords in Eighteenth Century, pp. 150—154. The difficulty was in part eluded by giving British peerages to eldest sons; their inheritance of Scots peerages did not alter their status as peers of Great Britain.

(x) 36 Lords Journ. 517.

(y) 37 Lords Journ. 594; their right to vote for Scots peers was admitted in 1793: 39 *ib.* 726.

(z) Pike, p. 362.

(a) See 10 & 11 Vict. c. 108. The rest are eligible in order of seniority.

(b) 25 Hen. VIII. c. 20; repealed 1 Ph. & Mary, c. 8, ss. 9—11; but re-enacted 1 Eliz. c. 1, ss. 7, 10. The bishops were legally excluded from Parliament by 16 Car. I. c. 27, and only re-admitted in 1661 by 13 Car. II. st. 1, c. 2.

advice of the Prime Minister after full consultation (c), then grants them a *congé d'élire* or licence under the Great Seal to proceed to an election, accompanied by *letters missive* nominating the person to be appointed. In the case of modern bishoprics where there is no dean and chapter (d), or if the dean and chapter do not elect the person nominated within twelve days, the Crown, by letters patent under the Great Seal, nominates and presents a person to the archbishop of the province in the case of a bishopric, and to one archbishop and two bishops or to four bishops in the case of an archbishopric, for investment and consecration (e), and the archbishop must invest and consecrate the person so presented within twenty days or incur the penalties of a *præmunire* (f).

If the dean and chapter elect the person named in the letters missive within twelve days, the Crown, by letters patent under the Great Seal, notifies the fact to the archbishop of the province, or, in the case of an archbishopric, to one archbishop and two bishops, or to four bishops, commanding him, or them, to confirm, invest and consecrate the bishop- or archbishop-elect, and this he is, or they are, bound to do within twenty days, or incur the penalties of a *præmunire*. Confirmation takes place before the vicar-general, and part of the ceremony consists of a citation, calling upon persons desirous of opposing the confirmation to appear; but, should opposers appear, the vicar-general is not obliged to hear their objections.

In *Dr. Hampden's Case* (1848) (g), upon application to the Court of Queen's Bench for a *mandamus* to compel the vicar-general to hear objections, the court was evenly divided as to whether it should issue or not. But in the case of Canon Gore, the bishop-elect of Worcester, 1902 (h), the Court of King's Bench unanimously held that a *mandamus* should not issue to compel the vicar-general to hear objections on the ground of doctrine, so that the citation of objectors (at any rate with reference to matters of doctrine) is now, from a legal point of view, simply an empty formula.

Having been confirmed, the spiritualities of the see are committed to the bishop, but he is not entitled to the temporalities until after consecration, homage, and the taking of an oath of fealty. Whatever the view may once have been as to the ground of the sitting of bishops in the Lords as holders of baronies, they certainly now sit by virtue of office only (i). A bishop may resign his see and thereby cease to sit in the Lords, though he retains rank, dignity and privilege (k).

(c) See Keith, *The King and the Imperial Crown*, pp. 365 ff.

(d) In the most recent creations of bishoprics by church measures provision is made for the creation of deans and chapters, and such institutions are contemplated for other bishoprics. See, e.g., *Southwark Cathedral Measure, 1937*, stat. iii. 2: a provost replaces the dean.

(e) 25 Hen. VIII. c. 20, s. 4. It will be noticed that in this case no confirmation is necessary.

(f) *Ib.* s. 7.

(g) *R. v. Arch. of Canterbury; Hampden, In re* (1848), 11 Q. B. 483. In Jebb's Report, 1 ff., full details of the forms are given.

(h) *R. v. Arch. of Canterbury and Another*, [1902] 2 K. B. 503.

(i) Pike, ch. ix. They are not triable by the House of Lords, so not peers: Standing Order, No. 66.

(k) Bishops' Resignation Act, 1869 (32 & 33 Vict. c. 111), s. 5.

**The Lords of Appeal in Ordinary.**—There are now seven Lords of Appeal in Ordinary appointed by the Crown under the provisions of the Appellate Jurisdiction Acts, 1876, 1913, and 1929 (*l*). In order to be eligible for appointment, they must have held high judicial office for two years, or have practised at the English, Scots, or Irish bar for fifteen years. They are entitled to a salary of £6,000 per annum (*m*), and are removable only on an address to the Crown by both Houses.

They are entitled to the dignity of Baron, and to a writ of summons to sit and vote in the House of Lords for life (*n*). It seems clear that they must be peers and triable by peers, though it is not likely this issue will ever be raised.

### *Privileges of the House of Lords.*

These are—

- ✓(1) Freedom from arrest, except in cases of treason, felony, or refusal to give security for the peace (*o*). In 1626 the Lords insisted on Charles I. setting free the Earl of Arundel (*p*). This privilege the Lords claim for themselves by Standing Order No. 57, “within the usual times of privilege of Parliament,” which presumably means, within forty days before and after each session, and by Order No. 60, for their servants within twenty days.
- ✓(2) Freedom from service on juries, and this privilege has been confirmed by statute (*q*).
- ✓(3) Freedom of speech.
- (4) Individual freedom of access to the sovereign. This is probably a relic of the fact that the magnates were hereditary counsellors of the Crown. It is now of small importance, as its serious exercise is incompatible with the principles of ministerial responsibility (*r*).
- (5) The right to see to the due constitution of its own body, and therefore to decide on the validity of new creations (*s*). Peerage claims are heard by the Committee of Privileges (*t*).

(*l*) 39 & 40 Vict. c. 59, ss. 6, 14; 3 & 4 Geo. V. c. 21, s. 1. Four are appointed under the former and two under the latter Act, and one under 19 & 20 Geo. V. c. 8.

(*m*) The reduction temporarily of judicial salaries by Order in Council in 1931 was strongly criticised in judicial circles as unconstitutional, and the Government in 1936 gave assurances of agreement in the doctrine of judicial security.

(*n*) Prior to 1887 they were only entitled to sit and vote in the House of Lords whilst remaining in the fulfilment of their office. By 50 & 51 Vict. c. 70, s. 2, they are entitled to sit and vote for life.

(*o*) Cf. *Newcastle (Duke) v. Morris* (1870), L. R. 4 H. L. 661; *Lonsdale (Earl) v. Littledale* (1793), 2 Anst. 356. It is contended that it can be claimed by any peer at any time: May, *Parl. Pract.*, p. 115. Minor peers, noblewomen and widows of peers have no privilege in this regard (Standing Order, No. 58); nor solicitors, nor attorneys (No. 61), and the former abuse of giving written protections is forbidden (No. 62).

(*p*) Gardiner, *Hist. of England*, vi, 114 f.

(*q*) 6 Geo. IV. c. 50, s. 2; 33 & 34 Vict. c. 77, s. 79.

(*r*) Keith, *The King and the Imperial Crown*, pp. 218, 220.

(*s*) *Wensleydale Peerage Case* (1856), 140 Hansard, 3 s. 329, *per* Lord Campbell.

(*t*) It is not, like the Lords, bound by earlier decisions, and is not a judicial tribunal proper, not being restricted to Lords holding judicial office. Petitions in regard to claims for old peerages are addressed to the Crown, reported on by the Attorney-General, and then referred to the Lords and by it to the Committee, unless they are admitted as clearly justified. See also p. 136, *post*.

The Lords cannot, however, decide on claims to old peerages, except on reference by the Crown, which in cases of claims for revival of dormant peerages may act on the Attorney-General's advice.

- ✓(6) The right to fine or to commit for contempt, and this they may do for a definite term, imprisonment not being terminated by prorogation, as in the case of the Commons, unless the commitment was for an indefinite term (*u*), a point, however, doubted by Lord Denman (*x*).
- ✓(7) The right under Standing Order No. 35, individually or collectively of recording a protest on the journals of the House. The right is subject to the power of the House to order deletion of protests (*y*).
- ✓(8) The right of exercising judicial functions as a Court of Appeal, and as a court of first instance, presently to be noticed (*z*).
- (9) The privilege of exemption from attending as witnesses is usually waived, as in the case of the Commons (*a*), and the claim to give evidence on protestation of honour only (*b*) is obsolete.

### *Reform of the House of Lords.*

**Proposals of Lord Bryce's Committee.**—As will be seen later (*c*) the House has now lost very largely its powers of control of legislation and finance, and for half a century projects of reform have been common. Lord Rosebery ploughed for years a lonely furrow. In 1908 a Committee of the Lords reported against the principle that mere possession of a hereditary peerage should confer right to a summons, and the House in November, 1910, adopted this doctrine and approved also the introduction of outside members. The proposals of Lord Lansdowne in May, 1911, contemplated (1) 100 peers with special official or administrative qualifications elected by their order; (2) 120 members elected by members of the Commons for large constituencies; (3) 100 appointed by the Crown on ministerial advice in proportion to the strength of parties in the Commons; (4) 2 archbishops and 5 bishops elected by their order; and (5) 16 judicial members. Membership for elected members in classes (1)—(3) was to be for 12 years, one-fourth retiring every three years. The prerogative of the Crown was to be limited to creating not more than five peers in any year. The plan clearly contemplated entrenching the Lords in an unassailable position, and was not carried beyond second reading in the Lords. The matter became of importance with

(*u*) *Shaftesbury's Case* (1673), 1 Mod. Rep. 144.

(*x*) *Stockdale v. Hansard* (1840), 9 A. & E. 1, 127.

(*y*) See Turberville, *House of Lords in Eighteenth Century*, pp. 28, 29, 107, 122.

(*z*) See *post*, pp. 245, 274. Formerly the Lords claimed and exercised the right to vote by proxy, but this has been discontinued by Standing Order, No. 34, passed on March 31, 1888: May, Const. Hist., iii, 14, 15.

(*a*) Anson, i, 243.

(*b*) Standing Order, No. 67.

(*c*) See pp. 104, 116, *post*.

the passing of the Parliament Act, 1911, and a serious attempt at an agreed solution was made by Lord Bryce's Committee in 1917—18 (*d*). The functions asserted as desirable were: (1) revision of bills from the Commons, in view, *inter alia*, of the defects due to measures passed under closure. (2) The initiation of comparatively non-controversial bills which could more easily pass if put in a well-considered form before reaching the Commons. (3) The interposition of so much delay in passing a bill as may be needed to enable the opinion of the nation to be adequately expressed, especially in the case of constitutional measures or those involving new principles of legislation or issues on which public opinion is divided. (4) Full and free discussion of large and important issues such as those of foreign policy, at times when the Commons is too much occupied to deal with them. Such discussions might be the more useful if conducted in an assembly on whose vote the fate of the Government does not depend.

It was agreed that the Upper House should not have equal powers with the lower, nor make ministries or control finance. No one party should dominate the House. Desirable members would include men experienced in public work, men possessing special knowledge of important departments of the national life and of foreign and imperial questions, and persons not extreme partisans.

**Later Proposals.**—The composition proposed was based on proportional election of 246 members by the House of Commons in thirteen groups, and eighty-one members, of whom all at first must be hereditary peers (to be reduced to thirty) chosen by a joint standing committee of five members of the two Houses. Provisions were made for deadlocks between the Houses by an utterly impossibly complicated procedure of conferences between selected members, and a committee of fourteen members from the Houses was to replace the Speaker as certifying money bills. The scheme was too conservative for the Liberals, and too advanced for the Conservatives. Governmental resolutions of July 11, 1922 (*e*) proposed a chamber of 350 members; (1) part elected directly or indirectly from outside; (2) part hereditary peers elected by their peers; (3) part nominated by the Crown. Certification of finance measures was to rest with a joint committee, and the power to pass bills over the head of the Lords was to be taken away as regards (1) the constitution of the House, and (2) its powers. This plan died with the Ministry, another was revived in 1925, and more seriously in 1927 (*f*) when the issues were mainly the question of safeguarding the people against social revolution under guise of financial legislation, and that of requiring a referendum on any fundamental constitutional change.

Several variants of the scheme have been considered, involving election either on a higher franchise or in large areas on proportional

(*d*) Parl. Paper, Cd. 9038 (1918). For earlier discussions, see May, Const. Hist., iii, 43 ff., 361 ff.

(*e*) 51 H. L. Deb. 5 s. 524—572, 642—682, 783—815, 963—996; 52 H. L. Deb. 261—288.

(*f*) 57 H. L. Deb. 5 s. 755—802, 862—950, 952—1006; 58 H. L. Deb. 664—667; 208 H. C. Deb. 5 s. 1285—1406.

representation, but election would render the House a dangerous rival of the lower House. Election by local bodies would likewise cause rivalry and would introduce further political feeling into local elections. Nomination would not solve the question. The proposal to insist on part of the House being based on heredity is essential to all Conservative schemes, such as that suggested by unofficial members in 1932, but is opposed entirely by Liberal and Labour opinion, on the score that it is wrong to have a House with a permanent Conservative majority. [The movement to secure abolition *in toto* has now become a definite part of Labour policy, and Sir S. Cripps in 1933 urged that Labour should only take office on a royal promise to override any attempt of the Lords to delay the extinction of capitalism by Orders in Council under an Emergency Powers Act. This movement evoked a counter propaganda (*g*) to limit the members of the House to 300, 150 chosen by some mode of election, and 150 peers elected by the peers, but this clearly would involve a fundamental constitutional change for which no mandate was asked during the general election of 1931.

In 1935 also no governmental policy could be announced, and a private Bill in the Commons on February 19, 1937, which proposed to refer issues of difference to a poll of local authorities, was universally condemned on the ground that no reform which did not vitally affect personnel could be considered, while Labour condemned the proposal on the inevitable ground that the county councils in particular are strongly Conservative in political outlook (*h*).

(*g*) Lord Salisbury introduced a bill to this end in December, 1933. He contemplated the reduction of spiritual peers to the archbishops and three bishops. The bishops supported the passing of the Parliament Bill by 13 votes to 2; hence their unpopularity: Oxford, *Fifty Years of Parliament*, ii, 104, n. Proposals by private members are obviously unconstitutional in that they involve drastic limitation of the prerogative without either governmental responsibility or a mandate: Keith, *Letters on Imperial Relations, 1916—1935*, pp. 256 ff.

(*h*) Cf. Keith, *The British Cabinet System, 1830—1938*, pp. 328 ff.

## CHAPTER IV.

## THE FUNCTIONS OF PARLIAMENT.

THE House of Commons supplies the means by which the electorate secures the presence in office of the ministry which is to carry out its wishes both for executive government and fresh legislation. Its function is not to form policy but rather to give effect to it. The forces which lead to policies lie largely outside Parliament. The electorate, the Commons, and the ministry are under constant pressure from all kinds of organised opinion, social, economic, financial, and cultural. The trade unions; co-operative societies; chambers of commerce; manufacturers' organisations; organisations to secure protection of free trade or to further protection; the shipping interest; associations of civil servants and municipal officials; professional bodies, such as the British Medical Association, the Institutes of Accountants and Surveyors; the local authorities of all kinds; bodies interested in public health, sanitation, education, housing, universities, cremation, and penal reform; societies for the promotion of science, fine art, literature, music, drama, opera, and so forth constantly mould public opinion, and lead to governmental decisions in accord with popular wishes. Popular feeling among all classes led, on February 26, 1937, to the abandonment of the unwise project of an aircraft factory at Maidenhead and compelled a safer location; in December, 1938, to the withdrawal of the Milk Bill. The working out of such principles is in slight measure the work of the Commons or ministers; it is the function of civil servants and expert committees.

**The Business of Parliament.**—The House of Commons now meets at 2.45 p.m. from Monday to Thursday, at 11 a.m. on Friday. On the full days the Speaker adjourns the House at 11.30 p.m. without question put, and after 11 p.m. only unopposed business can normally be taken. The exceptions are proceedings on reports of the committee of ways and means and on bills originating thereon, and proceedings made in pursuance of any Act of Parliament, including those on the Army and Air Force (Annual) Bill. But the Standing Orders may be suspended by the House on motion of a minister made without debate at the commencement of public business. On Friday no opposed business can be entered on after 4 p.m., and, when the business then under discussion is completed, or at 4.30 p.m. the House is adjourned (a).

Government business has normally precedence; up to Easter, Wednesday is allowed for motions by private members, Friday for their bills, but after Easter they have only the first four Fridays and

(a) Standing Orders Nos. 1 and 2.

the third to sixth Fridays after Whitsunday (*b*). After Whitsuntide precedence is given to non-governmental bills according to the degree of advancement which they have attained, so that as many as possible may be given a chance of passing.

On Monday to Thursday the House deals first with unopposed private business, *i.e.*, business connected with private bills in the technical sense, which is explained below; with petitions—now formally received, though the member who presents one may briefly state its purport; with motions for returns which are not opposed; with requests, now obsolescent, for leave of absence to members (*c*), and with ballots for notices of motion, for private members must ballot for priority, though ministers may give notices at their discretion. Questions follow on the disposal of private business but not later than 3 p.m., and then motions, if any, for the adjournment of the House to discuss a matter of urgent importance. On Tuesday and Wednesday, governmental and private members' motions for leave to bring in bills and for the nomination of select committees may be set down for brief consideration at the commencement of public business. On Monday and Thursday the Government alone can do so. The orders of the day follow; the government may arrange the items as it thinks fit, so far as its business is concerned, and so as to its notices of motion. On Friday the House deals with unopposed private business, petitions, orders of the day, and notice of motions. On rising on Friday adjournment to Monday is automatic.

The House may be counted out if a member calls attention to the fact that fewer than forty members are present and they cannot be mustered; this is only possible on Friday after 1 p.m., and is not allowed on other days between 8.15 and 9.15 p.m., a reminiscence of the dinner hour.

The essential work of the House consists in (1) the discussion of legislative projects mainly governmental, and of finance, and (2) the control over administration, which can be dealt with first as only brief treatment is needed. (3) Its judicial functions are relatively of minor concern.

#### *Control over Administration.*

**Control of the Executive.**—The Ministry, as has been seen (*d*), is essentially dependent in form on the Commons; in practice it has great power over it. But it is kept under constant criticism by the opposition and to a minor extent by the more independent of its supporters in matters of administration. The opportunities of criticism are not, indeed, very extensive. They are afforded by (1) the address

(*b*) If the session begins after Easter and before Christmas, Government business has precedence on as many Wednesdays immediately before Good Friday as those before Christmas on which it has not had precedence, and on as many Fridays as the number, reduced by three, of Fridays on which it has not had precedence. After Easter it has precedence except on Fridays, second to fifth, after Easter: see Standing Order No. 3.

(*c*) Efforts to compel attendance are now obsolete. There has been no call of the House since 1836, and refusal to attend a Committee is no longer followed by commitment: cf. *Smith O'Brien's Case*, 85 Hansard, 3 s. 1291; *J. P. Hennessy's Case*, 156 *ib.* 1931, 2213.

(*d*) See p. 5, *ante*; Keith, *The British Cabinet System, 1830—1938*, pp. 251 ff., 278 ff.

in reply to the speech from the Throne on the opening of the session which may occupy five days or so; (2) the period—rather over twenty days—of debates on the annual estimates, which is really devoted to issues of administration of the relevant departments, the opposition since 1896 being given the choice of votes for discussion; (3) the rule that on going into committee for purposes of financial legislation on four days (navy, army, air and civil estimates) grievances may be discussed on subjects selected by ballot; and (4) the debates on the Easter and Whitsun or Christmas adjournments. Further opportunities may be obtained if (1) the government gives time for discussion of a vote of censure at the request of the opposition, as it is bound to do if the request is reasonable, and (2) the Speaker accepts a motion to adjourn the House upon a definite matter of urgent public importance supported by at least forty members, or, if there are fewer than forty but not less than ten members to support, the House on question put permits the motion, in which case it is moved at 7.30 p.m. on that day (*e*). In this matter the Speaker has a wide discretion both as to urgency and importance, and, if the question affects foreign relations, may take into consideration the prudence of a debate; he also must consider if the matter raised will otherwise come before the House in a reasonable time. Motions by private members, now allowed by ballot on Wednesdays to Easter, afford a very slight chance of criticism, and so as regards bills of private members which are taken by ballot on Fridays in the early part of the session. After 11 p.m. no division is possible, but issues may be ventilated if questions have failed to clear up issues. Committees of inquiry discussed below sometimes are a serious weapon of offence.

Apart from opposition criticism, great weight attaches to the feeling of supporters, as ascertained by the whips and otherwise, and as expressed in speeches and the organs of the Press in the country. Thus the whole scheme of Mr. Chamberlain of asking the firms which would profit by rearmament to bear part of the extra cost was destroyed in 1937 by objections in governmental circles, and the cost was placed on the public in general, as the result of a carefully engineered movement of protest among those who supply funds for party purposes. In 1938 the retirement of Lord Swinton from the Air Ministry was forced by popular criticism, especially in Conservative circles, and the change in the Ministry of Agriculture was due to the by-election in East Norfolk, where withdrawal of a farmers' candidate was secured only by a personal promise to him from the Prime Minister that policy would be adjusted. Rearmament and air raid precautions in 1938—39 were forced on the ministry rather than initiated by it, and its negative attitude towards German claims for return of colonies was exacted by strong representations from the rank and file in the Commons and the country in the face of obvious reluctance on the part of the Prime Minister to spoil his plan of appeasement by a blank refusal. In like manner his pledge of aid

(*e*) S. O. 8, 9. On the question of anticipation, which means that by ingenious giving of notice of motions, discussion on the adjournment can be prevented, as often in 1904—05: see 125 Hansard, 4 s. 379 f., 629 f., 1229 f.; 136 *ib.* 836 ff.

to France on February 6, 1939, was the outcome of strong pressure from below. Maintenance of non-intervention in Spanish affairs was affected by the evidence of the by-election in Kinross and Western Perthshire, in which the Duchess of Atholl was defeated in an election challenged to test public feeling.

**Questions.**—A daily mode of keeping the Ministry up to the mark is the use of questions, oral and written, which occupy 3 p.m. to 3.45 p.m. every day (*f*). They must be addressed to Ministers only, be intended genuinely to elicit information, and must involve Ministerial responsibility. Thus, as soon as responsible government is conceded to any territory, questions regarding its affairs become out of order. This doctrine has often been pushed to extremes, as when information was declined in the Commons regarding the revolutionary innovation under which since 1931 the foreign affairs of the Irish Free State are arranged directly with the King, not through the Dominions and Foreign Offices. A fairly strict censorship of questions now prevails, but help will be given to members to keep within limits permitted by the Speaker or the clerks. Supplementary questions are allowed within limits, and often elicit more information damaging to the government than the original enquiries. But the Minister need not answer, and even original enquiries can be refused a reply if not in the public interest. No debate can arise, though the information elicited or withheld may furnish material for attack on a demand for adjournment of the House. Questions must normally be asked on notice, but a minister may in a case of urgency accept verbal notice, and does so without urgency when it is desired to state the order of business decided on. Questions need not be oral, and, if an oral question is not asked or its turn not reached by 3.45 p.m., a written reply will be printed in the official report of the debates, as in the case of questions which are not marked for oral answer.

### *Judicial Functions.*

**Forms of Functions.**—On one theory—not here accepted—the use of Parliament was at first largely for judicial ends, and certain very important functions still remain. The House of Lords is the final court of appeal, but in this capacity it is virtually constituted as a court proper. The whole body acts in impeachments, the Commons as accusers, the Lords as judges, and in bills of pains and penalties and of attainder both Houses have in fairness to hear the accused before passing measures. But these proceedings are obsolete (*g*). The Lords, however, are still by an inexcusable and unjust anomaly the tribunal for the trial of peers in cases of treason or felony. They also by their Committee of Privileges deal with disputed claims to old peerages on royal reference, and as of right with the effect of new

(*f*) S. O. 7; May, *Parl. Pract.*, pp. 238 ff. It is quite in order for a minister to deny official knowledge of what he has himself instigated: see Dugdale, Arthur James Balfour, i, 156 ff., for an amazing but not isolated instance of what in private affairs would be deliberate falsehoods.

(*g*) See Part IV., Chap. III., *post*.

patents (*h*). The House of Commons has abandoned the trial of election petitions (*i*). Both Houses in asserting their privileges act in a sense as courts, and in passing private and personal bills they formally follow a semi-judicial procedure, as will be seen below. The Speaker has a judicial function in certifying money bills under the Parliament Act, 1911, s. 1 (3), in determining the leader of the opposition under the Ministers of the Crown Act, 1937, and in noting breaches of privilege.

**Committees of Inquiry.**—Committees of inquiry of either House are comparatively recent inventions, one having been used in 1689 to investigate the conduct of the war in Ireland; that of 1855 as to the Crimean War caused the resignation of the Ministry, and, when Lord Palmerston took office and decided to appoint the commission, his action was strongly objected to by some members of the victorious opposition, Mr. Gladstone resigning in protest at its being appointed. His view was that such an investigation was incompatible with real confidence on the part of the Houses in the Ministry, but this is too high a claim where inquiry relates to past as opposed to current events (*k*). The power to insist on evidence on oath was only conceded in 1871 (*l*). Modern practice prefers either (1) royal commissions appointed by the Government as for inquiry into the Boer War (1902), into ritual illegalities in the Church of England (1904), on the poor law (1905), on the railway dispute (1909), &c.; or (2) for criticism on war, commissions set up under special Act, as in the case of the Dardanelles and Mesopotamia in 1916 (*m*); or (3) inquiries by special tribunals to which full powers are given as to compelling evidence on oath, when set up under a resolution of both Houses on a matter of urgent public importance (*n*). The advantages of this mode of procedure were conspicuously seen in 1936 when the disclosure of budget terms was investigated in this way, and the resignation of Mr. J. H. Thomas eventuated as the outcome of the report then made (*o*). It is true that there are difficulties in such proceedings as pointed out by Porter, J., in the report, but by common consent the use of a Select Committee would have failed wholly to eliminate politics. The Marconi Committee in 1912—13 showed this only too plainly.

**Petitions.**—Petitions, at one time an essential feature in legislative procedure, came to be preferred freely in the 17th century, seeking

(*h*) See p. 86, *ante*.

(*i*) See p. 72, *ante*.

(*k*) 136 Hansard, 3 s., 1837. Cf. Mr. Asquith, 84 H. C. Deb. 5 s. 1236.

(*l*) 34 & 35 Vict. c. 83. The Parnell Commission of 1888 was composed under statute of three judges, a select committee being refused: May, Const. Hist. iii. 122 ff., 181 f.; 51 & 52 Vict. c. 35. Punishment of recalcitrant witnesses is ineffective, as it must be treated as matter of privilege: cf. *Mr. Marxe's Case* (1912), 167 Com. Journ. 543; *Mr. Kirkwood's Case* (1897), 152 Com. Journ. 361.

(*m*) 6 & 7 Geo. V. c. 34; Dardanelles Reports, Cd. 8490, 8052; Cmd. 371; Mesopotamia, Cd. 8610.

(*n*) Tribunals of Inquiry (Evidence) Act, 1921 (11 Geo. V. c. 7).

(*o*) Cmd. 5184. For the attacks, not without some justification, on Mr. Lloyd George and Sir R. Isaacs, see 42 H. C. Deb. 5 s. 667 ff.; (1913), 54 *ib.* 391 ff., 542 ff.

redress of grievances, and for a time played an important part in history. They serve now merely the purpose, as a rule, of calling attention to demands of all kinds, for instance, in 1933 co-operative societies' objections to paying income tax on reserves. They (*p*) must include a prayer, be addressed to the Commons, in temperate language, be signed, and cannot ask for public expenditure without the sanction of the Crown. The subject-matter must fall within the legislative competence of Parliament if legislation is asked for. Such competence will not be judged by mere possibility of legislation: where Western Australia asked for permission to secede from the Commonwealth, the petition was held inadmissible because such legislation without Commonwealth initiative would be unconstitutional (*g*). Their presentation is now formal, and they are referred to the Public Petitions Committee, which issue reports informing the Commons of their purport. In the case of petitions to both Houses a Joint Select Committee may be set up to report on the issue of their reception as competent. There is no arrangement for debates on reports, though on a petition complaining of a present personal grievance requiring an immediate remedy the matter may in theory be brought into discussion on presentation. Normally discussion must take place on a motion in the ordinary way: the Government did not even provide time for a debate on the report on the Western Australia petition above referred to. Petitions against proposed taxation are now receivable, a concession dating from 1842 and 1853; it was one of the American grievances in 1765 that petitions against the Stamp Act were not allowed under the rules of order. A petition if objectionable may be rejected on presentation, or on report by the Committee (*r*), but that is now rare.

**Petition or Motion for Removal of Officers.**—One form of petition may be productive of a motion for the removal from office, *e.g.*, of a judge or other high official. Such cases are now extremely rare; if any action were desired, it would be carried out through a committee of inquiry of the Commons, and only on its unfavourable report would the House consider a motion for an address to the Crown; probably it would itself take evidence, and, if an address were approved, the same procedure would be followed in the Lords (*s*). But there is no probability of such action being necessary under modern conditions. The opposition sometimes tables a motion merely as a form of protest, *e.g.*, for the removal of Lord Trenchard from the office of Commissioner of Metropolitan Police (1933), or in the case of judicial indiscretions.

(*p*) S. O. 75—79. The inherent right to petition and the right of the Commons to receive or refuse to receive was laid down in resolutions of 1669: *Pankhurst v. Jarvis* (1909), 101 L. T. 946. The new treatment dates from a resolution of Feb. 20, 1833.

(*g*) H. L. Papers, 52 and 75 of 1934—35; Keith, *Letters on Current Imperia* and *International Problems*, 1935—36, pp. 26—29.

(*r*) The Prittlewell petition of 1875, which criticised the conduct of three judges on Orton's trial, was thus discharged, probably because it reflected on the Speaker's impartiality: 223 Hansard, 3 s. 976; cf. the rejection of the famous Kentish petition for the better prosecution of the war in 1701: 13 Com. Jour. 518. See May, *Parl. Pract.*, ch. xxii; *Const. Hist.*, i, 349—355.

(*s*) Cf. *Sir Jonah Barrington's Case*, Todd, *Parl. Govt.*, ii, 736.

*Legislation.*

**Development of Power of Parliament.**—It was only by degrees that the Parliament developed into the legislative authority. The King with the aid of his Council legislated by constitution—a term reminiscent of the Roman Empire—or assize (*t*), or ordinance, or made treaties with his people in charter form. It was only by degrees that his authority was reduced. The *Confirmatio Cartarum* in 1297 admitted that common assent was requisite for taxation other than the customary aids and prises; Edward I. refused to abandon the right to levy tallage on the boroughs, but public opinion forced its formal surrender in 1340, and in the same year Edward III. had explicitly to admit that the levy of any customs duties beyond the ancient custom, defined statutorily in 1275, required the consent of prelates, magnates, and Commons in Parliament (*u*). In 1322 Edward II. conceded that their joint assent was required for permanent legislation (*x*). Under Henry V. we find the Commons insisting in 1414 that they have ever been a necessary part of Parliament. From 1318 Acts are made with the assent of prelates, earls, barons and the commonalty, after 1327 the request of the Commons or Lords and Commons is often recited; the authority of Parliament appears from 11 Henry VI. and prevails from 1 Henry VII.

**Evolution of Legislative Procedure.**—Bill procedure is the outcome of petitions of the Commons or the Lords and Commons assented to by the Crown, and then entered on the statute roll, and thus distinguished as permanent, and irrevocable by any power save Parliament, from the Ordinance, in form of a charter or letters patent, made by the King or King in Council, and revocable, which competed with Acts until the Stuart epoch. The King promised assent, because he needed funds, and grievances had sometimes to be remedied before sums were granted. But, until the time of Henry VII. the King or Lords might alter petitions, evoking a protest under Henry V. (*y*), when the Commons declared that no statute had ever been made without their assent and that they had always been “as well Assentirs as Petitioners,” and received a disingenuous and vague promise to respect the wishes of the House saving the prerogative of refusal. From 1423 the Commons present petitions separately, not in a comprehensive petition. A bill from the Lords, where it was addressed to the King, was hardly ever amended in the 15th century in the Commons, and then received the royal assent. A bill in the Commons was also so addressed, asking him to enact with the advice and assent of the Lords; it was often amended, and if only restrictively, the amendments

(*t*) The term denotes the session (of King and Council); then what is decided there; then the institution thereby created. On legislative forms, see H. L. Gray, *The Influence of the Commons on Early Legislation* (1932); E. H. R., *xlvi*, 656–658.

(*u*) Clarke, *Medieval Representation and Consent*, pp. 274, 275.

(*x*) *Statutes of the Realm*, i, 189; see p. 46, *ante*. For the forms of enactment, see Chimes, *English Const. Ideas in the Fifteenth Century*, pp. 101–104.

(*y*) (1414), *Rot. Parl.*, iv, 22, the first petition in English, but in 1363 the Chancellor had addressed Parliament in English; Chimes, *English Const. Ideas in the Fifteenth Century*, pp. 160 ff., corrects the exaggeration current of this episode.

did not need Common's assent; if they extended the measure, they did. All acts assented to were enrolled in Chancery, but only a selection of measures of permanent character, made, perhaps, by the Council were put in final form by the judges and enrolled on the statute book. Private bills were never so enrolled; if introduced in the Lords they were addressed to the King, if in the Commons to them; the form of royal assent differed as now (z). Greater precision between petition and Act was secured by the adoption of the practice, initiated by the Crown in its bills, of presenting the terms of the measure in the petition (*billa formam actus in se continens*), or by the Commons asking, as in 1429, that it be answered according to its tenor and form (a). But it is essential to note that, though from 1399 legislation appears largely to derive from Commons' petitions, it was only up to c. 1450 that this meant the power of the Commons. Thence, and especially after 1484, the bills were mainly official, a sign of the reaction under Richard III. and Henry VII. By Henry VIII. the system of three readings is recorded in the Lords, under Edward VI. in the Commons. The system reduced the action of the King to assent or refusal of assent, and drew a clear distinction between the Crown in Council and the Crown in Parliament.

**Forms of Legislation.**—The normal Act of Parliament is the enactment of a rule of substantive law, or in some cases of procedure. In the eighteenth century Acts virtually of executive character, for cleansing towns, relieving the poor, naturalising aliens, enclosing commons, and widening roads, were common, but these are now out of date. Private, local, and personal measures are hardly legislative in character, nor are financial measures, or approval of treaties, or provisions for investigation of university affairs, including the appointment of commissioners, or inquiry into military campaigns.

### *Public Bills.*

At the present day the procedure for public bills, which with a few slight variations, is the same in either House, is as follows:—

Bills may originate in either House, except money or appropriation bills, and bills dealing with the representation of the people, which originate in the Commons, and bills for the restitution of honours, and the now virtually obsolete bills for granting a general pardon (Acts of Grace), and bills of attainder and pains and penalties, which generally originate in the Lords. It is usual, also, for bills affecting the privileges or proceedings of either House to commence in that House. The regulations for the proceedings with regard to public and private bills

(z) Chrimes, pp. 218—249, modifying Gray's results; *communes petitiones* do not mean specifically bills originated by the Commons, but bills affecting the community at large. The treatment of bills rests on the evidence of Kirkby, of the rolls, in *Pilkington's Case* (1455), *ib.* pp. 231 ff., 360 ff. For the statute roll from 5 Hen. VII. there is substituted an enrolment of Acts delivered into Chancery, which starts from 1 Rich. III.

(a) Rot. Parl., iv, 359. There is, however, no early connection between the *billa formam actus* and Commons' petitions. It is found in official and private bills in early times, but in Commons' Bills only under Henry VIII.: Gray, pp. 180 ff., who corrects Stubbs, *Const. Hist.*, ii, 608 ff., and Pollard, *Evolution of Parliament*, p. 130.

are to be found in the Standing Orders of either House. Every public bill must pass through several stages. The essential power to secure legislation rests with the Government, for to it is allocated by the Standing Orders the essential portion of the time of the House of Commons, leaving to the private member only the chance that he may be successful in the ballot for priority in moving the second reading of a bill on the Fridays allocated up to Easter, on the four Fridays after Easter Day, and on the third, fourth, fifth and sixth Fridays after Whit Sunday, for private members' bills, and that thereafter the bill may be lucky enough to secure time or be taken up by the Government and given a chance to pass. A number of important measures have indeed thus been passed, including the Matrimonial Causes Act, 1937, widely extending the law of divorce.

**1. Modes of Introduction.**—In the Commons money bills of all kinds have first to be dealt with in committee of the whole House and approved by the House on report, when an order is made for the introduction of a bill. In other cases prior to 1902 notice of motion for leave to introduce a bill had to be entered by the member who wished to bring in the bill; an order for introduction was then made. Since 1902 (in pursuance of Standing Order (Public Business) No. 32 (2)), a member may either give notice of his intention to adopt the old procedure, or may, after notice, present a bill at the table without an order of the House. The former procedure is now normal only under Standing Order No. 10 (1888), which allows the Speaker, after a brief explanatory statement (confined to ten minutes) from the mover and an opponent, to put the question, or to invite a vote as to adjournment. This procedure is rarely used save to ventilate a topic or when it is hoped to conciliate possible opposition by explanation. Bills passed by the House of Lords if taken up by a member are held to have been ordered for first reading (*b*). In the Lords, no notice of motion or leave is necessary, and any member may present a bill, and have it laid upon the table.

It must be remembered that royal consent to discussion of any proposal to limit the prerogative must be secured (*c*). But it need not be given before discussion begins, though it is requisite before third reading, as in the case of the Government of India Bill, 1935.

**2. First Reading.**—By modern practice, after introduction without leave, a bill is deemed to have been read the first time and ordered to be printed; if leave is asked for, it may be denied, but otherwise order is made for presentation, and it is handed by the proposer to the clerk, its title read, and its first reading and printing voted without debate, and an order made for second reading on a date intimated by the introducer. Before printing a bill is scrutinised by the authorities of the House to see if it is in order, *i.e.*, does not affect private rights

(*b*) Standing Order No. 32 (1).

(*c*) Keith, *Letters on Imperial Relations, 1916—1935*, p. 256. It is clear that the Crown must allow discussion, as in the case of Mr. Gladstone's resolution asking the Queen to place her interest in the temporalities of the Irish Church at the disposal of Parliament, when Mr. Disraeli declined to dissuade the Queen from giving assent: Monypenny and Buckle, ii, 377 ff.

(in which case if allowed to proceed it must do so as a "hybrid" bill), nor have as its main object a charge on public revenues. If it is held by the Select Committee on Standing Orders, on report from an Examiner of Petitions for private bills, that some Standing Order as to such bills is applicable and has not been complied with, that the Standing Order should not be dispensed with, the bill is removed from the Order paper, and so also if the bill imposes a charge on public revenues.

**3. Second Reading.**—At the second reading the principle of the bill is discussed, but not the details, and the question put, "That the bill be now read a second time," and this is either carried—in which case the principle of the bill is affirmed—or an amendment is moved, "That the bill be read this day six months," or at some date beyond the probable duration of the session. If the amendment is carried, the effect is to prevent the bill being passed into law during that session. A direct negative merely shelves the bill for the day, and so is not usual. An alternative mode of opposing a bill is by moving a resolution, as an amendment to the original question, altering the character of the bill or stating reasons why the House should not proceed further with the consideration of the bill. If this amendment is carried, it in effect negatives the bill.

**4. Method of Voting.**—The votes in case of division, in the House, or in Committee, are taken first on the voices, but if the Speaker's or Chairman's statement is challenged, he directs the lobby to be cleared; two minutes thereafter he again puts the question, and if his opinion is again challenged he announces the names of tellers, who are chosen from the Government and opposition on ordinary bills of party character, but from the chief supporters and opponents in the case of non-party bills, or where the matter is left open by the Government. After six minutes from this direction, he directs the locking of the doors giving access to the division lobbies, and the total numbers are checked on exit by one teller for ayes and noes, while the names are taken down for the division lists by clerks. The ayes lobby is that to the right, the noes is that to the left of the Speaker. Since 1906 a member need not vote; prior to that, refusal might lead to suspension. Since 1888 on the second taking of votes, if the Speaker or Chairman thinks the questioning of his ruling needless, he may call on those who accept and who challenge his decision successively to rise, and then either announce finally his ruling or name tellers: this is seldom done. When a division is to be held the ringing of bells throughout the House fetches members to vote, for it is not necessary to be present at a debate to vote, and members regularly cut dull debates.

**5. Committee Stage.**—Having passed the second reading, the bill (if it is a money bill) is now referred to a committee of the whole House, presided over by the chairman of committees (d). Other bills

(d) Standing Orders Nos. 46—48. The sending of bills to small committees is found under Elizabeth, *e.g.*, in 1571, and larger "General Committees" are known under James I., but the committee open to all members appears first under Charles I. It was liked because the Speaker was then often a tool of the King to control members.

went to the same committee until the Commons found itself overburdened; from 1888 there were two committees to which bills might go; in 1907 four standing committees were adopted, one a Scottish Committee to which all bills except finance and provisional orders bills should normally go. In 1919 the increase of business resulted in the increase of the committees to six; the number of their members being reduced from 60—80 to 40—60, and the number of members who could be added for the consideration of any bill reduced to 10—15. In 1926 the number was reduced to five, the membership to 30—50, and the maximum number added to 35. In the case of bills relating exclusively to Wales and Monmouthshire all members for these areas must be put on the committee. The Scottish Committee includes all the Scots members and 10—15 outsiders selected in view of the strength of parties. The members are chosen by the Committee of Selection, a body chosen by the party leaders and chiefs at the beginning of each session in proportion to party strength, and numbering eleven; the Speaker now at the commencement of each session selects not less than ten members to act as temporary chairmen of committees at the request of the chairman of ways and means, and from this panel, which includes *ex officio* the chairman and deputy chairman of ways and means, he appoints the chairman of each standing committee. Members who so desire or do not attend, can be replaced by the committee of selection, thus preventing destruction of bills by mere abstention. These committees greatly facilitate legislation and improve its quality, as the Government can make concessions without loss of prestige, and they give the ordinary member useful work to do. Their chief defect is lack of publicity.

All bills (e) other than money bills stand now committed to one—selected by the Speaker—of the five standing committees, unless the House on motion by any member, decided without amendment or debate, otherwise orders; on the motion of the member in charge, it may be referred in part to a Standing Committee, in part to the committee of the whole House. Or it may be referred to the whole House, or to a select committee or, if the Lords agree, a joint select committee of the two Houses. This was done successfully in the case of the Government of India Bill of 1935, as it allowed full consideration of all arguments for and against by taking evidence. The bill is now said to be in committee, and is considered clause by clause and amendments made. These should not contradict the principle, but the committee may in effect amend away the substance of a bill. If the amendments go beyond the title of the bill, the committee should amend the title and report specially the fact. The report of a select or joint select committee (which can only be formed with the assent of the other House) is referred to a committee of the whole House. The House may give instructions to guide the committee, so as to

(e) Bills to confirm provisional orders are treated on the analogy of private bills in so far that normally they are referred to a Private Bill Committee or the Committee on Unopposed Bills. Hybrid Bills go to a select committee, nominated partly by the House, partly by the Committee of Selection.

enable it to go beyond the scope and framework of the bill (*f*). In committee, as opposed to the House, members may speak more than once in support of or against amendments, and motions need not be seconded.

**6. Report Stage.**—Having passed through committee, the fact is reported to the House by the chairman, and this is termed the *Report Stage*. If the committee is a standing committee, or, being one of the whole House, has amended the bill, on a day named the bill is considered, in the latter case in its amended form, and amendments may be made or clauses added (*g*), or it may be again referred to committee. A motion to recommit a bill is put without debate save a brief explanatory statement for and against.

**7. Third Reading.**—The bill is then read a third time, but may be met with amendments similar to those permitted on the second reading, or a proposal to recommit if amendment is desired, since in the Commons only verbal amendments may be made at this stage (*h*); in the Lords new clauses may be added or amendments made, and this may also be done on the motion that the bill shall pass, which is not proposed in the Commons.

**8. Use of the Closure.**—To secure effective debate the Speaker or chairman may stop irrelevance, and may order an offending member to discontinue his speech. He may refuse to put a motion for the adjournment of the debate or of the House, or to report progress or leave the chair, if he thinks it is moved for purposes of delay and in abuse of the rules, or may put the motion without debate. The Speaker may name a member for disregard of his authority or persistent obstruction, when the offender will be suspended by order of the House; in committee the chairman suspends its work, and the Speaker takes the chair. As against grave and continuous general disorder the Speaker since 1902 (*i*) can adjourn the House without question put, or suspend any sitting for a time named, so as to allow passions to cool. To secure the passage of a bill against obstruction drastic action became necessary in 1881 against the Irish Parliamentary party, and a formal power to act existed from 1882 to 1887. It was superseded in 1887—88 by the present rule, which allows any member to move the closure, leaves to the Speaker, having regard to minority rights, the right to put the motion or not, and requires 100 members in favour for the motion at least (*k*). An alternative form is to move when a clause is under consideration that the clause stand part of, or

(*f*) Cf. Mr. Speaker's ruling, October 26, 1921; 147 H. C. Deb., 5 s. 873.

(*g*) But at the Report Stage no amendment may be made which could not have been proposed in committee without an instruction from the House: Standing Order No. 41. No one can speak more than once on Report except in the case of report from a standing committee when the member in charge, or the mover of an amendment or new clause, is privileged.

(*h*) Standing Order No. 42.

(*i*) Standing Order No. 20. Curiously enough, Conservative members have been the worst offenders in disorder.

(*k*) Standing Orders Nos. 26, 27, 28. For the history, see May, Const. Hist., iii, 102, 103, 123, 178, 179, 233.

be added to. From 1887 has been used the "Guillotine," *i.e.*, the fixing of a period for debate on the various stages of a bill, at the end of which all debate is stopped. From the Home Rule Bill of 1893 was used the form of closure by compartment, under which, usually by arrangement with the opposition, so much time is given for discussing each part of a bill. The Education Bill of 1902 was thus carried, and in 1914 the Finance Bill, the Government of Ireland Bill and the Welsh Church Bill. During the war it was only needed for the Military Service Bill of 1918, but was revived in 1921, and not seldom since (*l*). In 1911 it was requisite to introduce "Selection of Amendments," or the "Kangaroo," which allows in committee and on Report the presiding officer to select the amendments to be debated (*m*). The procedure is destructive of full debate, but is defended by all Governments as essential, as in the case of the Unemployment Bill of 1933. Where the opposition is reasonable, full discussion is still possible, as in the case of the Government of India Bill, 1935. Closure and "Kangaroo" are used in standing committees (*n*).

**9. Sending on the Bill.**—The bill is then sent to the other House by message. If the bill is sent to the Lords from the Commons, it is endorsed "*Soit baillé aux seigneurs*"; if sent from the Lords to the Commons the indorsement is, "*Soit baillé aux communes*."

**10. Reading in the other House.**—The bill is read three times in the other House, and may be agreed to either with or without amendments, or rejected.

The procedure in the Lords is analogous to that of the Commons. But there are no rules restricting introduction of bills; a bill sent up by the Commons is normally taken up by a Lord, who gives notice of second reading within twelve sitting days: otherwise it drops out and can only be restored to the paper on eight days' notice. The Lords use committees of the whole House or select committees, or can agree, as already noted, to a joint select committee with the Commons.

Prior to the passing of the Parliament Act, 1911, which relates only to bills sent up by the Commons to the Lords, the position with regard to bills sent from either of the two Houses to the other House was as follows:—

If the bill were returned by one House to the other after third reading with amendments, the House which originally passed the bill might determine to abandon it, in which case it was lost; or a compromise might be effected in one of two ways—either by a formal conference (*o*) with the other House, or by communicating a statement

(*l*) The Guillotine was invented for the Criminal Law and Procedure (Ireland) Bill, 1887: see Dugdale, Arthur James Balfour, i, 128—135; Balfour, 197 Hansard, 4 s. 999.

(*m*) The system was provided for in 1909, but only on a special resolution; it was generalised in 1919: Standing Order No. 28. For its merits, see the debate of July 6, 1921; 144 H. C. Deb., 5 s. 455.

(*n*) Standing Order No. 47 (5), applying Orders Nos. 18, 22, 26—28.

(*o*) These conferences gave place to messages in 1851 (Standing Orders, House of Lords, pp. 64 f.), with one exception in 1858. The alternative of a free conference was used up to 1740, but only in 1836 was it resorted to in later days.

of reasons for disagreeing to or insisting on the amendments. Such statements since 1855 are communicated to either House by a clerk of the other, in lieu of the Masters of Chancery or judges earlier employed by the Lords and the chairman of Ways and Means or the member in charge of the bill by the Commons.

If the Lords rejected a bill sent up from the Commons, or if no compromise could be arrived at with regard to amendments, the only solution of the difficulty, if the Commons refused to abandon the measure, was an appeal to the electorate by a dissolution, when, if a majority were returned pledged to support the measure, the Lords would either give way, or, in the event of their not doing so, the Crown could create sufficient new peers to ensure the passing of the measure, as was done in 1712 (*p*) on the occasion of the passing of the Treaty of Utrecht, when a wag asked if the twelve new lords would vote by their foreman, and as was threatened to be done, should the Lords refuse to give way, in the case of the Reform Bill in 1832 (*g*). On the occasion of the passing of the Reform Bill of 1832, the bill was rejected on its second reading in the Upper House; but having been reintroduced in the Commons and sent back, the Lords yielded to the combined pressure of the Crown and the Commons, and passed the measure.

**Conflicts between the Houses.**—The Reform Act led slowly to conflicts between the Houses, and the spread of democracy by the increase of the electorate. The Irish Church Disestablishment Bill, 1869, raised much controversy, but was secured in part by Lord Cairns' influence (*r*). In 1871 the bill to abolish the purchase of army commissions was rejected, but the system was abolished under existing powers, the cancellation of the royal warrant authorising purchase (*s*). In 1884—85 the intervention of Queen Victoria secured a compromise on the disputed issue whether the Lords could insist on a redistribution bill being carried simultaneously with the measures extending the franchise (*t*). Mr. Gladstone's second Home Rule Bill, 1893, was rejected, but the Ministry would not risk an election, and their defeat in 1895 homologated the Lords' action. The strengthening of that body by the addition to the Conservative elements of financial and commercial magnates and former Liberals on the Home Rule split induced in the Parliament of 1906—10 fierce struggles, the Lords asserting the right to refuse to pass bills on the score of their probable unpopularity with the electors or hasty passage in the Commons. Measures for reform of education, of licensing, of plural voting, of Scots land, were defeated, and in 1907 the Commons resolved that the powers of the Lords should be so limited that the will of the Commons should prevail in one Parliament. But the issue that was decisive

(*p*) Anne had created four peerages for the strengthening of the Tories in 1703, but had also created a Whig peerage. See Turberville, *House of Lords in Eighteenth Century*, pp. 44, 45, 115—118.

(*g*) William IV., May 17, 1832; May, *Const. Hist.*, i, 287; cf. 97, 98; Keith, *The King and the Imperial Crown*, pp. 184—186.

(*r*) 197 Hansard, 3 s. 293; May, iii, 204—212.

(*s*) Royal Warrant, July 20, 1871, under 49 Geo. III. c. 126; May, iii, 274—277; Keith, pp. 71, 308, 426.

(*t*) Keith, pp. 151, 187 f., 224.

was the rejection of the Finance Bill of 1909. An election of January, 1910, gave the Government a majority, though dependent on Labour and Irish aid; the death of the King was followed by a long-drawn out conference to seek a settlement by consent; on its failure Parliament was dissolved and the election in December, 1910, gave no change in party strength. The Crown consented (November 15—16, 1910) to aid the Government to end the deadlock; on August 10, 1911, on a formal warning of the creation of peers, the Lords passed the bill by 131 to 114 votes (*u*). The fact that the royal assent was kept secret must be regarded as unsatisfactory in the extreme and as unfair to the King and the electorate, and it may be hoped that such tactics will not be repeated (*x*).

**The Parliament Act, 1911.**—Under this Act, which came into force on August 18, 1911, if any public bill (other than a money bill (*y*), or a bill providing for the maximum duration of Parliament beyond five years) is passed by the House of Commons in three successive sessions (whether of the same Parliament or not), and has been sent up to the House of Lords at least one month before the end of each session, and is rejected (*z*) by the House of Lords in each of those sessions, unless the House of Commons directs to the contrary, the bill is to be presented to the Crown, bearing an indorsement signed by the Speaker of the House of Commons, that the provisions of the Act have been complied with, and becomes an Act of Parliament on the royal assent being signified in the usual manner (*a*). Any certificate of the Speaker "shall be conclusive for all purposes and shall not be questioned in any Court of law" (*b*). This provision, however, does not take effect unless two years have elapsed between the date of the second reading in the House of Commons in the first session and the date on which it passes the House of Commons in the third session (*c*).

On the passage of the bill in the second and third sessions the House of Commons may suggest amendments to be considered by the House of Lords, which if agreed to by the latter may be inserted in the bill. Otherwise on any successive passing and sending up to the House of Lords the bill may contain only such alterations as have been rendered necessary by the lapse of time since the last passing, or which represent amendments made by the Lords in the preceding session, or in the

(*u*) Keith, *The King and the Imperial Crown*, pp. 189—201; Newton, *Lansdowne*, pp. 384—431; Oxford, *Fifty Years of Parliament*, ii, 67—105; E. Allyn, *Lords versus Commons*, 1830—1930.

(*x*) The King clearly cannot be criticised for giving a promise subject to the will of the electorate, the political sovereign; the only difficulty would arise if the majority were slight. But for the King to promise and to allow voters to vote not knowing that he had done so seems incompatible with respect for the sovereign.

(*y*) For the provisions of the Act relating to money bills, see p. 115, *post*.

(*z*) A bill is deemed to be rejected by the House of Lords if not passed either without amendments, or with such amendments as may be agreed to by both Houses: *Parliament Act, 1911* (1 & 2 Geo. V. c. 13), s. 2 (3).

(*a*) *Parliament Act, 1911* (1 & 2 Geo. V. c. 13), s. 2 (1). A curious theory was put forward by Unionists in January, 1913, that the reference to assent restored a real right of a veto, obviously absurd, but troubling the King: *Esher, Journals*, iii, 117 f.

(*b*) *Ib.* s. 3.

(*c*) *Ib.* s. 2 (2).

third session, and agreed to by the Commons (d). The Speaker's certificate is decisive on this point (s. 2 (3)). Not having been passed by the House of Lords, a change in the usual form of wording of the enacting clause is required for bills passed under the Act; and this is provided for by the Act (e).

The Act, in short, gives to the House of Commons power to pass any public bill provided that the provisions of section 2 are complied with; but it leaves to the House of Lords a suspensive veto which may prevent the bill from becoming law for at least two years.

A public bill does not include a bill to confirm a provisional order, which is analogous to a private bill, but it is, of course, for the Commons to decide what it shall treat as public bills, and the Speaker's certificate would conclude the matter.

**Effect of the Act.**—The effect of the Act is to reduce the Lords during the existence of a Conservative Government to a mere machine for minor changes; during a Labour or Liberal regime it can use its power to enforce substantial changes, because Ministries prefer securing legislation in modified form to complete loss, with possible risk of final failure. Thus the Labour Government in 1930 had to accept the continuation of the Dyestuffs (Import Regulation) Act, 1920, for another year, the amendment of the Coal Mines Act, and the omission of State acquisition of land for experimental purposes in the Land Utilisation Act of 1931, while it had to drop its Education Bill of 1930. The National Government from 1931 made only minor concessions to the Lords, refusing any point of principle on the Coal Bill, 1938. No Act has yet been passed under the procedure which has become effective by virtue of it alone. The Government of Ireland Act of 1914 never took effect at all, and the Welsh Church Act of 1914 was only brought into operation by a new measure passed in the ordinary way (f).

It is a disputed question whether with the Parliament Act procedure available, it would now be proper to ask the King to swamp the Lords to secure early passage of a bill. The answer seems to be that it would only be possible to do so if the Government had (1) raised the issue as crucial at the general election and received a mandate of a clear character, or (2) had gone to the country after receiving and publishing a royal promise to act on a decisive vote. The nearest precedent is that of the destruction of the Legislative Council of Queensland by swamping by a Labour party adherent as Lieutenant-Governor to secure abolition; the Act was assented to, on being reserved, by Mr. Churchill's advice (g).

(d) *Ib.* s. 2 (4).

(e) The enacting clause of bills passed under the Act is to run: "Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Commons in this present Parliament assembled, in accordance with the provisions of the Parliament Act, 1911, and by authority of the same, as follows."

(f) 9 & 10 Geo. V. c. 65, s. 2.

(g) Keith, *Responsible Government in the Dominions* (1928), i, 460 ff. For an interesting plea for automatic royal action, see H. J. Laski, *Parl. Government*, pp. 417 ff. as against Keith, *The King and the Imperial Crown*, pp. 183 ff.

11. **Royal Assent.**—Having passed both Houses (*h*), or having complied with the provisions of the Parliament Act, 1911, stated above, the bill is ready for the royal assent, which may be given either in person or by commissioners empowered by letters patent under the sign manual and Great Seal (*i*). Pending assent money bills remain in the custody of the Clerk of the House of Commons, other bills in that of the Clerk of the Parliaments. Should the Lords fail to return a money bill within the month allowed under the Parliament Act, 1911, it may be assumed that the Clerk would either recover it or present a fresh copy for assent. Up to 1793 Acts whenever assented to took effect from the beginning of the session; by 33 Geo. III. c. 13, this was altered; the date of assent is endorsed by the Clerk of the Parliaments and is the date of commencement of the Act unless otherwise prescribed. There is nothing to forbid (*k*) *ex post facto* legislation, but naturally this is rare, in substantive law as opposed to procedure, and the Courts never give retrospective effect unless it is clearly intended, while it is quite common to authorise later bringing into force by executive order of the Act or of parts thereof. The form of assent for ordinary bills is *le roy le veult*, for money bills *le roy remercie ses bons sujets, accepte leur benevolence, et ainsi le veult*, and for a private bill *soit fait comme il est désiré*. Assent is refused by the words *le roy s'aviserà*. Assent was refused rather (*l*) frequently by William III., who declined to accord statutory security of judicial tenure, but has been uniformly granted since 1707, when Anne refused assent to the Scotch Militia Bill.

If the Crown is opposed to a measure at the present day, it would either attempt to dissuade the Ministry from introducing it, or ask it to make the issue clear by an appeal to the nation by dissolution; if the nation shows itself in favour of the measure the Crown must yield (*m*). If the Ministry refused to dissolve and determined to demand assent to a bill under the Parliament Act, 1911, the King would have to yield or to dismiss them.

(*h*) A difficult point arises if a bill should be assented to accidentally without having been passed (*e.g.*, by confusion with another measure); in fact, it would no doubt be set right by a fresh Act, as happened when in 1844 two Eastern Counties Railways Bills were confused and one which the Lords had not passed was assented to: 7 Vict. c. xix. For another case, see 6 & 7 Vict. c. lxxxvi. On March 9, 1937, the Lords agreed to return the Ministry of Health Provisional Order Confirmation (Earsdon Joint Hospital District) Bill, which had not passed third reading in the Commons. It is clear that the Courts will not examine into the regularity of procedure in Parliament, *e.g.*, as to counting of majorities, but the view that the Habeas Corpus Act, 1679, was passed by inaccurate counting of the Lords is very dubious; Burnet (*i*, 485) is not more than an anecdote, though Tanner, *English Const. Conflicts*, p. 244, n. 3, accepts it.

(*i*) 33 Hen. VIII. c. 21, s. 5; S. R. & O., 1916, No. 1412.

(*k*) Contrast the Irish Free State Constitution, s. 43; *Performing Right Society, Ltd. v. Bray Urban District Council*, [1930] A. C. 377.

(*l*) William III. had not the dispensing and suspending power of the Stuarts, and he did not, like the Tudors, control an obedient Parliament. His reign is a period of transition. George III. in 1774, 1784 and 1807 showed reliance on his control of the Legislature to reject any Act, but also determination to refuse assent. For Charles II., see E. C. Fryer, *E. H. R.* xxxii, 103.

(*m*) See as to dissolution, and as to dismissal, *post*, Part III., Chap. II.; Keith, *The King and the Imperial Crown*, pp. 202 ff.; *The British Cabinet System, 1830—1938*, pp. 375 ff.

*Provisional Order Legislation.*

Provisional orders have certain of the characteristics of private bill legislation which they have in part superseded by reason of their much less cost. Their object is to give effect to schemes of local bodies and companies, subject to approval of the Government department and of Parliament. Orders, therefore, normally do not take effect until confirmation by Parliament, but occasionally they contain retrospective clauses of innocuous type. The department only submits for approval to Parliament such schemes as it approves, scheduled to bills. On first reading they are referred to the examiners who deal with private bills, to ensure that all standing orders have been complied with. If opposition is offered to any order, the bill is referred to a select committee and treated as a private bill. But normally there is no opposition, trust being placed in the department, and it goes to the Committee on unopposed bills, described below. Such matters as making of piers, harbours, tramways, electric lighting, local government areas, regulation and enclosure of commons, are thus dealt with. Other matters also may be entrusted by Parliament to departments for order making such as pilotage issues and copyright royalties (*n*). Far more important is the rule that Scots private legislation is normally conducted on this basis by the Scottish Office (*o*), unless principles of an important kind are involved or English areas also are affected. Thus in 1937 the Caledonian Power Bill was treated as a private bill, opposed largely because Wales wished the carbide industry to be located there, and defeated, though 47 Scottish members favoured and 11 only opposed. Special conditions apply to hybrid bills, *i.e.*, bills which involve private interests also.

*Private Bills.*

These are either Acts concerning private persons in connection with such matters as marriage settlements, marriage, estates, names, nationality, or divorce, or local Acts connected with such matters as railways, canals, drainage, or the like, passed generally on behalf of public companies or municipal corporations. The former normally are introduced in the House of Lords. Such bills can be traced back to Henry IV. when they were presented to Parliament or the Lords or Commons, and were sent, if approved by one House to the other. At first usually personal, *e.g.*, as to attainders, they came to deal with the regulation of fisheries, the navigation of rivers, the inclosing of common lands, the drainage of marshes, and so on (*p*).

An important ruling of the Speaker on February 8, 1939, held that the London Rating (Site Values) Bill could not be allowed to proceed

(*n*) Copyright Act, 1911 (1 & 2 Geo. V. c. 46), s. 19 (3).

(*o*) Private Legislation Procedure (Scotland) Acts, 1899 and 1933 (62 & 63 Vict. c. 47, and 23 & 34 Geo. V. c. 37), replaced by 26 Geo. V. & 1 Edw. VIII. c. 52. For occasional retrospective clauses, see sect. 26 of the Order in the Lanarkshire County Council Order Confirmation Act, 1922 (12 Geo. V. c. i.).

(*p*) See Gray, *Influence of Commons on Early Legislation*, pp. 48—54, 290 ff., 336—377. The bills which were sent by Lords to Commons, were addressed to the King, not to the Lords.

as a private law in view of the great public importance of the principle of rating of such values, although the bill, promoted by the London County Council, was of limited character. Such a ruling, of course, virtually destroys all prospect of success for a valuable measure, opposed naturally by the great interests which at present escape a due contribution to the common welfare.

The procedure, which with slight variations is the same for bills originating in either House, is in outline as follows. The time given in the Commons to private bills is 2.45 to 3 p.m., just before questions; any business in progress then stands over to a time fixed by the Chairman of Ways and Means, who may direct that it be taken at 7.30 p.m. on days other than Friday, when a serious discussion, as in the case of the Caledonian Power Bill, can take place.

**1. Lodging Petition.**—Preliminary advertisement of the scheme in the Press is required in October and November, and on or before December 5 owners and occupiers of land affected must be notified, and plans deposited with local authorities by November 20. A petition with a copy of the bill annexed must be lodged at the Committee and Private Bill Office, on or before November 27, and a printed copy of the bill at the Treasury, and at the General Post Office on or before December 4 (*g*).

**2. Memorials by Opposers and Examination.**—Memorials by opposers of the bill that the Standing Orders have not been complied with may now be lodged at the same office, and on December 18 following the bill goes before two examiners appointed by the Lords and the Speaker, when supporters and opposers are heard with the object of ascertaining whether the Standing Orders (Private Business) have been complied with. On or before January 8 the Chairman of Ways and Means and the chairman of committees in the Lords decide by themselves or their counsel in which House the bill shall be introduced. The procedure in the case of introduction in either House is similar; in the Commons it is as follows:—

**3. First Reading.**—The petition is then sent back to the Private Bill Office with an indorsement that the Standing Orders have been complied with or the reverse, and within one day of such indorsement must be presented to the House. The bill is laid upon the table of the House by the clerk of the Private Bill Office, and is either deemed to be read a first time or referred to the Select Committee (*r*) on Standing Orders if the Standing Orders have not been complied with. The committee has power to waive compliance, when the bill may be presented and deemed to be read.

**4. Second Reading.**—The bill then comes on for second reading in not less than three days or more than seven days from the first

(*g*) Standing Orders (Private Business) Nos. 38, 39. See also the provisions of the latter Order as to copies to be deposited at various offices.

(*r*) It consists of four members at least, the Chairman and Deputy-Chairman of Ways and Means, and at least two members selected by the former from a panel appointed by the committee of selection each session: Standing Order, No. 98.

reading. If it passes the second reading, which is not normally opposed unless some principle (*e.g.*, municipal trading or public amenity) is involved, when the course of giving an instruction to the committee to strike certain powers out of the bill may be given, the principle or expediency of the bill is affirmed, conditionally, however, and subject to proof of the allegations of fact contained in the petition before committee.

**5. Reference to Committee.**—The bill is then referred to the Committee of Selection; local legislation bills used to go to a Local Legislation Committee, now disused (1930) (*s*), and there is no longer a Select Committee on Divorce (*t*). The committee then appoint a Select Committee of four members (five in the Lords) which deals with the measure as a judicial body, no member whose constituents are interested serving. The Chairmen of Ways and Means and of committees can call attention to necessary amendments, and Government departments may intervene for the same end. Committees are bound to notice in their reports any recommendations made. Unopposed bills go to a Committee on unopposed Bills, composed of five members, the Chairman and Deputy Chairman of Ways and Means and three members selected by the Chairman from a panel appointed each session by the Committee of Selection; it is aided by the Speaker's counsel. Joint committees on private bills are sometimes used.

**6. Discussion in Committee.**—Before the committee witnesses are adduced, examined and cross-examined; counsel for the promoters or opposers (*u*) of the bill are heard; and it is first decided if the preamble is proved, *i.e.*, if a case for the legislation has been made out; if so, then the clauses are dealt with in detail in the same way, amendments made, and new clauses added, often as the result of concessions made by the promoters to conciliate opponents.

**7. Third Reading, &c.**—The bill as amended in committee is reported to the House. It is then submitted to a consideration stage at which it may be amended. Then it comes up for third reading. If it passes the third reading (at which no amendments, not being merely verbal, may be made) it is sent up to the House of Lords, where it is not rare to refuse assent, but where amendments are not often made, and eventually receives the royal assent in the same way as other bills, but in a different form of words. It is noteworthy that a threat to refuse assent has been used in regard to a private bill in order to compel acceptance of changes deemed necessary by the Government. If the measure affects the interests of the Crown or the Duchy of Cornwall, consent must be given before third reading.

(*s*) It consisted of fifteen members, but was held to delay the progress of bills unduly.

(*t*) Divorce bills are practically only needed for Northern Ireland, and are very rare.

(*u*) If the right to oppose is disputed, it is decided for the Commons by a Court of Referees (the Chairman of Ways and Means, Deputy Chairman, the Speaker's counsel, and not less than seven members chosen by the Speaker, three at least forming the Court); for the Lords by the Chairman of Committees, after legal argument.

A similar procedure is necessary in the case of public measures affecting Crown rights (*e.g.*, the Administration of Justice (Scotland) Act, 1933).

The bills, after assent, are printed as Local and Private Acts, the former including all but personal Acts; they are judicially noticed, while personal Acts must be pleaded.

It may be noticed that the provisions of the Parliament Act, 1911, do not apply to private bills, but only to public and money bills.

### *Money Bills.*

**The Constitutional Position with regard to Money Bills.**—With the Bill of Rights the attempts of the Crown (*x*) to impose taxation without the consent of Parliament came to an end; the Crown, however, remains the head of the executive, and retains through its constitutional ministers the control and management of the public revenue, nor can any sum of money, even though granted by the Commons, be applied by the Treasury in defraying the expenses of the public services without the authority of an order under the sign manual.

The primacy of the Commons rests on very ancient usage, dating from the period of Richard II. The violation of their rights by Henry IV., through discussing with the Lords the needs of the country, led to his affirmation in 1407 of the position of the Commons, and from 1625 Acts by their form attest the grant by the Commons of subsidies (*y*). But the danger—which became real in the Colonies and persists in the United States—of confusion of finance by individual initiative disappeared in essence in England through the Commons' self-imposed denial.

It is a constitutional principle that no bill creating a charge upon the public revenues, or altering the incidence of or imposing new taxation upon the people, shall be introduced in the Commons except upon the recommendation of the Crown, expressed through a member of the Ministry (*z*). Such is the present constitutional position of the Crown with regard to the initiation of taxation and the control of the public revenue. The Crown in the first instance makes known to the Commons the necessities of the Government, and the Commons by taxation and appropriation provide the necessary supplies; and it is to this power of the purse and to its power to bring the whole executive machinery of the country to a standstill that the House of Commons owes its control over the executive. It is true that, after the Appropriation Act is passed, a ministry may in theory carry

(*x*) See p. 10, *ante*, and pp. 202, 203, *post*.

(*y*) In 1523, the Lords are stated to have left decision as to the subsidy demanded by Wolsey to the Commons, who varied the grant asked by the Crown, but in 1593 Bacon expressly concedes the possibility of a bill being sent from the Lords: *Tanner, Tudor Const. Doc.*, pp. 608—610.

(*z*) See Standing Order No. 63. Resolutions in favour of expenditure may be passed, and the Lords may send down bills with financial clauses in italics, but no direct proposal is in order. *Incidental* expenditure in private members' bills will not prevent consideration, as the government may before the committee stages make financial provision.

on for a time by using the funds thus available, or by drawing on the Civil Contingencies Fund, but, unless the Finance Act has been passed, neither income tax nor customs receipts would be available, and the expiry of the Army and Air Force (Annual) Act would bring final disaster, and very probably severe punishment for flouting the will of the Commons.

The position of the Lords with regard to money bills passed by the Commons, either granting supplies, or imposing new taxation, is at the present day limited to assent. The power to deal with financial issues is restricted to pecuniary penalties or forfeitures to secure the execution of the Act, and to imposition of fees in respect of benefits taken or services rendered, not being payable into the Treasury or Exchequer or in aid of the public revenue; there is, of course, full power in the case of private bills for local or personal Acts (a). In 1661 the Commons refused to consider a bill from the Lords laying a charge on the people, and in 1662 the Lords yielded (b). At first the Commons did not refuse minor amendments as in 1660, 1663 and 1670. In 1671 the Commons passed a resolution to the effect that the rate of taxation imposed by the Commons should not be altered by the Lords; in 1677 the Commons by 156 to thirty-seven votes rejected a proposed amendment, and voted in 1678 that all aids and supplies are the sole gift of the Commons, and ought to begin with the Commons, that it was "the undoubted and sole right of the Commons to direct, limit, and appoint in such bills the ends, purposes, considerations, conditions, limitations, and qualifications of such grants which ought not to be changed or altered by the House of Lords" (c). Thus the Commons assumed the right to initiate and regulate taxation. The Lords then could not resist, but on December 9, 1702, they showed the limits of their acceptance by resolving that "the annexing any clause or clauses to a Bill of Aid or Supply, the matter of which is foreign to and different from the matter of the said Bill of Aid or Supply, is unparliamentary, and tends to the destruction of the constitution of this Government." In 1726, when the question was raised as to the propriety of a message asking for funds for the navy being sent to the Commons only, the Lords acquiesced by fifty-nine to thirty-one votes. In 1746, similarly, a protest was overruled, Hardwicke, L.C., arguing that it was as natural to apply to the Commons for finance as to the Lords on issues of judicature. It was noted as a novelty in 1763 when a division was called for on the Wines and Cider Duties Bill (d).

The Lords, however, might still reject altogether money bills passed by the Commons, and this they did in 1860, refusing to pass the bill

(a) Standing Order No. 44. Standing Order (Private Business) No. 245 waives privilege on private bills and bills to confirm provisional orders in respect of tolls and charges and local rates.

(b) 11 Lords Journ. 328 a, 467—469. So in 1665, *ib.* 650; and in 1677, Hatsell, *Precedents*, iii, 89.

(c) 9 Com. Journ. 235, 509. Contrast 12 Lords Journ. 498 b; 14 *ib.* 257—269; in 1679 the Lords surrendered on resistance to another attempt to amend.

(d) *Parl. Hist.*, xv, 1316. In 1772 a bill sent back amended in a money clause was thrown over the table by the Speaker and kicked out of the House.

for the repeal of the paper duties. In consequence the Commons passed a resolution to the effect that the House regarded the power of the Lords to reject money bills with very great jealousy, and that the Commons had it in their own power so to impose and remit taxation as to render difficult or impossible the exercise of the power (e). In the next session the Lords gave way and passed an Act covering the whole financial scheme for the year, and including the repeal of the paper duties. Since that time it has been customary for the Budget imposing new taxation for the year to be comprised in single Acts, known since 1894 as Finance Acts, which, until the year 1909, were generally passed by the Lords as a matter of course without amendment. In the year 1909, however, the refusal of the House of Lords to accept the scheme of taxation (involving the Land Value duties) initiated by a Liberal Government led to the rejection of the Finance Act of that year. Upon the subsequent dissolution and appeal to the electorate, the Liberal Government was again returned in a majority, and the Lords gave way rather than submit to the wholesale creation of peers, which would otherwise have been rendered necessary. The Budget proposals of 1909 were therefore enacted in 1910 in the form of the Finance (1909—10) Act, 1910 (f). The inconvenience caused to the country and the Ministry by the delay of the financial measures necessary for the government of the country was one of the principal reasons which led to the passing of the Parliament Act, 1911, which enables money bills to receive the royal assent and become Acts of Parliament, even though rejected by the House of Lords. The provisions of the Act relating to money bills will be found stated later (g).

**Procedure with regard to Money Bills.**—The demand by the Crown for supplies to meet the services for the year which runs from April 1 is made in the speech from the Throne, which also intimates that estimates will be submitted of the amounts required. The estimates for the financial year have in the preceding autumn and winter been made out and submitted to the Treasury by the heads of the various departments, and passed by the Cabinet, and are presented as soon as possible to the House, together with supplementary estimates in respect of expenditure for the current year. The estimates are in four parts, navy, army, air, and civil, including the revenue departments. The civil estimates are in classes of Votes, each with sub-heads; the defence estimates have each Vote A for pay, &c. for the men, and other votes for money. A full discussion of the finance of the year is initiated by the Chancellor of the Exchequer in his Budget Speech, in which the requirements, as based upon the estimates, are detailed; and, if the proceeds of permanent or existing annual taxation are insufficient to meet the demand made by the estimates, a new scheme of taxation is proposed.

(e) May, Const. Hist., i, 380—383; 24 & 25 Vict. c. 20; 159 Hansard, 3 s., 1383; the issue arose in 1894; 27 Hansard, 4 s. 253.

(f) 10 Edw. VII. & 1 Geo. V. c. 8; May, Const. Hist., iii, 343—384.

(g) See p. 115, *post*.

All questions with regard to money matters are considered by the House of Commons, either in Committee of *Supply* or in Committee of *Ways and Means* (*h*), which are both committees of the whole House (*i*), to which they report periodically their findings for sanction (*k*). The House resolves after replying to the speech from the Throne that on certain dates it will go into Committee of Supply and on another into Committee of Ways and Means.

In Committee of Supply the estimates for the expenditure of the ensuing financial year are considered and discussed, and supplies voted to meet the requirements of the year as based upon the estimates. Since 1896 only twenty days are allowed up to August 5, but three more may be added before or after that date. But days needed for supplementary estimates on the former session or a vote of credit or for war purposes or for a new service not in the estimates do not count in the twenty, nor do the days when the House first goes into Committee on each great group as explained below. At the close of every sitting, the Committee asks leave to sit again, after reporting any resolutions agreed on, and the progress made. On the nineteenth day, at 10 p.m., the chairman puts at the end of the day all votes necessary to complete consideration of the votes; on the twentieth, at 10 p.m., the Speaker disposes of the reports of the votes, for all votes must be agreed to in the House.

The votes to be dealt with on each occasion are since 1896 agreed on in accordance with the wishes of the opposition. Since 1882 the House normally passes into committee without question put except on first going into committee on the navy, army, air, or civil estimates or a vote of credit when an amendment can be moved on the proposed estimates (*l*).

To make good the supply it is necessary to obtain authority to utilise the Consolidated Fund, which is fed by (1) permanent sources of revenue, and (2) new taxation. Both these issues, authority to draw and new taxation, are the affair of the Committee of Ways and Means.

In Committee of Ways and Means any new modes of taxation, which may be necessary, are discussed and considered, and resolutions

(*h*) The Committee of Supply dates from James I., that of Ways and Means from the Long Parliament (Journ. H. of Com., ii, 138) and Charles II.

(*i*) The chairman of these committees is appointed at the commencement of each session, immediately after the address to the Sovereign has been agreed to (Standing Order No. 13). The rule of action in committee is founded on a Standing Order (No. 64) adopted March 29, 1707.

(*k*) In certain cases proposed expenditure is dealt with simply in a (money) committee of the whole House: (1) exceptional grants, *e.g.*, to compensate slave owners; (2) rewards for servants of the Crown; (3) incidental charges in bills not financial. See Standing Orders Nos. 66—71. A serious question arose on March 8, 1937, on the mode in which resolutions authorising expenditure in connection with bills were framed, the contention being that in this mode it was rendered impossible for the opposition to move amendments to the government's proposals for dealing with distressed areas in the Special Areas Bill. Finally, it was agreed to refer the question to a special enquiry by Select Committee. The point, of course, is that without close drafting the governmental responsibility for finance might be injured. The report, H. C. Pap. 149 (1936—37) urged that care should be taken to avoid too great precision, and the House agreed.

(*l*) Standing Order No. 16.

passed accordingly, which are subsequently reported to the House and embodied in bills known formerly as *Customs and Inland Revenue Acts* and now as the annual *Finance Acts*. The taxes which are thus considered and dealt with in Committee of Ways and Means, are, however, only such as are required to meet the exigencies of the public revenue. Changes in the fiscal system not connected with increasing revenue are dealt with in a separate committee of the whole House (*m*).

In Committee of Ways and Means resolutions are also passed, and subsequently embodied by the House in Consolidated Fund Acts, authorising the payment out of the Consolidated Fund of lump sums to meet the current expenditure of the year as based upon the supply grants already voted in Committee of Supply or to be voted later (*n*). The authority for the issue of the sums so granted is supplemented by authorising the Treasury to borrow by Treasury bills or otherwise, and the Bank of England to advance the sums named in the Act.

Finally, at the end of the financial year an Appropriation Act (*o*) is passed, which embodies the various Consolidated Fund Acts passed during the year, continues borrowing powers, authorises the payment out of the Consolidated Fund of any balance required to make up the total of the supply grants, and specifically appropriates the sums so granted to the specific heads of expenditure embodied in the estimates. The authority for the payment out of the various sums by the Treasury is made complete by a royal order under the sign manual (*p*).

**Committee on Estimates.**—The control of estimates in Committee of Supply is obviously negligible; the votes up to 1927 were put forward without any principle, and, though now improved, it is useless for members to seek to criticise details for lack of time and knowledge. In 1912–14 a Standing Committee on Estimates was set up, but only after presentation of the estimates, and its tardy and inexpert reports did little service. In 1918, a Select Committee on National Expenditure urged the use of the system, and since 1920 a Select Committee is set up of twenty-eight members. But it has not the necessary powers to do useful work. It can only examine estimates presented; it can recommend only economies consistent with the policy implied; it has no expert adviser save a Treasury official who naturally guides it on official lines, and can only act on what information it can collect from other members of the House

(*m*) May, *Parl. Pract.* p. 542.

(*n*) The Consolidated Fund (No. 1) Bill, which must be passed by March 31, includes: (1) supplementary votes for that year; (2) the main votes of the defence estimates for next year; (3) a vote on account of the civil estimates to cover the period up to August as a rule; (4) excess votes for the preceding year, *i.e.*, excesses on amounts appropriated in that year on civil votes, and on total of each defence estimate, after submission to the Public Accounts Committee. Final approval is given in the Appropriation Act of the next financial year, *e.g.*, an excess on 1937–38 will be discovered in 1938, included in the Consolidated Fund Bill thereafter, and appropriated in the Appropriation Act of 1939. In fact, the sums spent will normally have been derived from savings on other heads and overpayments in appropriation in aid, and their use *ex post facto* approved by a resolution in committee of supply and so on: Hilton Young, *System of National Finance*, pp. 142–144.

(*o*) It covers the civil estimates and the remaining votes of the defence estimates.

(*p*) See Part VI., Chap. II., *post*.

or the public; it can only go through two or three departmental estimates each year; worst of all, it cannot secure days for examining its reports in the Commons, for the Commons desires all the time to discuss political issues, not details of economy, always unpopular (g).

The sanction of Parliament, though uninformed, is technically complete. It grants money annually, and detailed appropriation is usual since 1689. The civil estimates are presented under classes, votes and sub-heads (r), those for revenue departments and for defence under votes and sub-heads. Transfer even between sub-heads is only allowed in civil votes by the Treasury in the case of allied sub-heads, between votes requires sanction by Parliament; in the case of defence estimates the Appropriation Act sanctions Treasury approval of transfer. As grants lapse at the end of the year, and as new demands may be necessary after the Appropriation Act, supplementary estimates are often needed (s). Where no serious estimate is possible as in war time, a vote of credit is passed instead, and given to the Treasury which can in some degree control the departments, as in the Great War. Exceptional grants (*e.g.*, in November, 1875, purchase of the Suez Canal Shares) are sometimes needed and can be presented as estimates.

One anomaly must be noted. The miscellaneous sums received in respect of services rendered by government departments are set off against their expenditure as appropriations in aid, being formally authorised in the Appropriation Act. These sums may not be reduced by motion in Committee of Supply, which is a deviation from principle founded on the wording of the Public Accounts and Charges Act, 1891, on which the system is based (t).

It must also be noted that the estimates, apart from an experiment, dropped in 1926, with the army votes, do not show the total cost of any service including all expenditure on it by other branches, but that this information is given in an Annual Gross and Net Cost Statement (u).

**Assent to Money Bills.**—Such money bills, whether Finance Acts, or Consolidated Fund Acts, are subject to the same procedure as to first, second, and third reading, and sending up to the House of Lords, as other public bills, which have already been treated of, save that the committee stage is usually formal. But by the Parliament Act, 1911, if a money bill (*viz.*, a public bill which, in the opinion of the Speaker of the House of Commons, deals only with matters of the imposition, repeal, remission, alteration or regulation of taxation;

(g) Parl. Pap. H. C. 121, 1918; H. C. 129, 1932; H. C. 51, 132, 1933; Standing Order No. 14 (4); Marriott, *Mechanism of Modern State*, i, 539—552; Hilton Young, pp. 66, 67.

(r) The form was modified in 1927 as suggested by the Estimates Committee: H. C. 59, 119, 1926.

(s) The expenditure authorised, pending a Consolidated Fund Act, may be met by Treasury order under the Public Accounts and Charges Act, 1891, s. 2 (1), from funds already voted, *e.g.*, as regards the extra naval personnel in 1938 on the occasion of the crisis (H. C. Pap. 3, 1938—39), or from the Civil Contingencies Fund (Part VI., Chap. II., *post*).

(t) Young, *System of National Finance*, pp. 50 ff.

(u) *Ibid.* pp. 32, 33.

imposition of charges on the Consolidated Fund or on money provided by Parliament, or variation or repeal of such charges; supply; appropriation, receipt, custody, issue, or audit of accounts of public money; raising or guarantee or repayment of any loan; or incidental matters) is sent up to the Lords at least one month before the end of the session, and is not passed by the latter within one month, then, unless the House of Commons otherwise directs, such bill is to be presented to the Crown and becomes an Act of Parliament on the royal assent being signified (*x*). Any such bill when sent up to the Lords and when presented for the royal assent must be endorsed with a certificate signed by the Speaker of the House of Commons that it is a money bill; and before giving his certificate the Speaker is to consult, if practicable, two members appointed from the chairmen's panel at the beginning of each session by the Committee of Selection (*y*). The Speaker's certificate is conclusive for all purposes and shall not be questioned in any Court of law.

**Public Accounts Committee.**—The audit of expenditure rests primarily with the Comptroller and Auditor-General, whose functions are noted later (*z*). His report is presented to the House of Commons and since 1861 is examined by a Public Accounts Committee of fifteen members, normally presided over by a member of the opposition, and including the Financial Secretary to the Treasury. It is aided by the Auditor-General, by the Treasury, and by the departmental officers, who must attend as required. The Auditor-General's efforts are seconded by the Accounting Officers in the departments whose duty it is to secure that all expenditure is duly authorised. Though its reports are belated, being based on a report itself a year after the year audited, and the Commons do not trouble to debate them, it seems to impress duties of care on departments and aids the Treasury control, while it may find fault with the Treasury itself. In extreme cases payments may be disallowed and officers surcharged. The Auditor-General does not hesitate to comment on unwise as opposed to illegal expenditure, nor does the Committee, but the Commons do nothing (*a*).

(*x*) Parliament Act, 1911 (1 & 2 Geo. V. c. 13), s. 1 (1), (2).

(*y*) *Ibid.* s. 1 (2), (3). It is not easy to follow exactly the grounds on which certain Finance Bills have not been certified: H. C. Pap. 89, 1927.

The Commons waive privilege as to initiation and amendment of bills, including fines and fees, not payable to the Exchequer (Standing Order No. 44) and local rates under Private and Provisional Order Bills (Standing Orders (Private Business) No. 245).

The enacting clause of a Finance Act is couched in a special form: "We, Your Majesty's most dutiful and loyal subjects, the Commons of the United Kingdom in Parliament assembled, towards raising the necessary supplies to defray your Majesty's public expenses, and making an addition to the public revenue, have freely and voluntarily resolved to give and grant unto Your Majesty the several duties hereinafter mentioned; and do therefore most humbly beseech Your Majesty that it may be enacted, and be it enacted," &c. In the case of the Appropriation Act the relevant words are: "towards making good the supply which we have cheerfully granted to Your Majesty in this session of Parliament, have resolved to grant unto Your Majesty the sum hereinafter mentioned."

(*z*) See Part VI., Chap. II., *post*.

(*a*) *Finer, Modern Government*, ii, 839, 840; *Epitome of Reports from the Committees on Public Accounts, 1857—1937*; H. C. 154, 1938.

*Parliamentary Defects and Proposed Remedies.*

It is clear that Parliament has too much work to do, and cannot perform it very effectively, and that it has lost prestige and even authoritativeness in considerable measure. The decline in authority is evinced by such movements as the trade unions' suggestion, approved even by Mr. R. MacDonald, of setting up Workers' Councils to break down British participation in the war; the formation of a Council of Action in 1920 to dictate foreign policy and to prevent attack on the Bolsheviks in Russia, by the threat of a general strike; the triple alliance of 1921 of railwaymen, transport workers, and mine workers to compel nationalisation of the mines; the general strike of 1926; and the Independent Labour Party's policy in 1933, and 1936—39. Remedies have been suggested of various kinds. The proposed reform of the House of Lords has already been noted (b).

There are many subjects on which legislation is too long postponed, such as factory legislation, long overdue when at last reached in 1937, workers' compensation, measures to improve the Housing Acts, the poor law, town planning, &c., though recently by the action of a committee of experts useful measures amending the common law have been put on the statute book with reasonable expedition and a minimum of useless obstruction, as in the case of the reform of the law affecting women, or the effect of death on legal liability (c). There are cases too in which the House has not the necessary expert knowledge to debate measures effectively, and such knowledge is not placed at their disposal by the Government which has made its own decision on departmental advice denied to the House. Many Acts are badly drafted, even when they touch matters of great importance, e.g., the Regency Act, 1937, and practically every Income Tax Act, while the Acts on compensation for workmen have resulted in problems which even the House of Lords has not successfully faced. Moreover, there is no time for discussing many important issues, which might be discussed on private members' initiative without the Government being compelled to take up a definite policy. There are many questions on which such discussion is really requisite to clarify the views of the ministry and of the electorate alike. As matters stand, such a problem as that of the Divorce Bill of 1937 succeeds in being dealt with only through the luck of the ballot and the deep conviction of a member of Parliament whose presence there was secured by private initiative among electors for the University of Oxford without official party support.

**Regional Devolution.**—The example of the Irish Free State and Northern Ireland naturally suggests reduction of the burdens of Parliament by the application of some analogous system to Scotland

(b) See p. 87, *ante*.

(c) See Law Reform (Married Women and Tortfeasors) Act, 1935 (25 & 26 Geo. V. c. 30); *Barber v. Pigden*, [1937] 1 K. B. 664; Law Reform (Miscellaneous Provisions) Act, 1934 (24 & 25 Geo. V. c. 41): the latter Act is unhappily obscurely drafted: see *Rose v. Ford*, [1936] 1 K. B. 90, commenting on *Flint v. Lovell*, [1935] 1 K. B. 354, and doubting *Stater v. Spreag*, [1936] 1 K. B. 83; reversed, [1937] A. C. 826.

and Wales, countries of distinct national characteristics, but this would, it is clear, be of comparatively minor importance. The centralisation, however, of business of every kind in London has serious economic and cultural effects in the rest of the country. Banks, shipping, great industrial combinations, insurance, trade unions, the Press, the theatre, music and art tend to have their headquarters there, and industry has tended to be there concentrated, to the detriment of the north. New enterprises have normally been started in the south. It has been proposed to create a number of local areas in England—say seven—and to establish legislatures and departments for such issues as agriculture and fisheries, public health, housing, education, public assistance, local government, and maintenance of order, including police and prisons (*d*). But such limited powers would not satisfy Wales or Scotland; in the latter one party—the National—demanded Dominion status, another—the Scottish—wide powers excluding only imperial relations, foreign affairs and defence, with arrangements for a common customs. Nor has their partial merger resulted in any definite unification of opinion. In 1937–39 an intransigent nationalism became marked in Wales, manifesting itself in hostility to defence preparations, and denunciation of the trial of Welsh criminals by other than Welsh juries, while the right of Welsh speakers to use that language in English Courts, even when they know English, was asserted. Nor, it seems, is there much desire in England for devolution; the proposals of the Speaker's Conference on Devolution (*e*) were not accepted with such interest as to justify legislation. The chief objections lie in the facts (1) that there are great advantages in uniformity in education and public health no less than in labour legislation, unemployment insurance and assistance, and electric power development and transport; (2) that foreign affairs are intimately related with trade and labour questions and with agriculture; (3) that finance presents almost insuperable complexities; (4) that legalism based on constitutional division of powers is objectionable and tends to delay or thwart progress; and (5) that recent conditions of national planned economy including relief of the distressed areas demand centralisation. But these arguments, valid in a measure for England, are held inconclusive in Scotland and Wales.

**Functional Devolution.**—It has been proposed to relieve Parliament of all commercial and allied issues by creating either an independent authority (*f*) representing capital, workers, and consumers, to legislate, or an advisory body (*g*) which would have all economic measures referred to it, would have the right to suggest legislation, and would promote industrial peace and research. It would consist in part of representatives of employers, in part of workers' representatives, to whom would be added experts and members of Parliament. There

(*d*) Ramsay Muir, *How Britain is Governed*, ch. viii.

(*e*) Parl. Paper, Cmd. 692 (1920). See Keith, *The British Cabinet System, 1830–1938*, pp. 349–355.

(*f*) S. Webb, *Constitution for the Socialist Commonwealth of Great Britain* (1920).

(*g*) The Economic Council of Germany under the Weimar Constitution (now in abeyance) is often adduced as a model.

are considerable difficulties in suggesting any effective basis of representation, and it is not clear that economic issues could very effectively thus be discussed. If there were two distinct Parliaments, one for foreign affairs, dependencies, defence, justice and police, and one for economic issues, conflicts of authority would be inevitable, and in any case under modern conditions foreign affairs and economics are inseparably combined.

A recent form of devolution is that of the Marketing Boards for milk, bacon, pigs, hops, &c. There Parliament imposes on bodies more or less representative of producers and distributors duties of regulation and restriction of supply and price fixing, subject to the control of the Minister of Agriculture and Fisheries. But unsatisfactory operation of, *e.g.*, the milk scheme in Scotland, has involved a good deal of governmental and parliamentary discussion (*h*).

**Suggested Procedural Reforms.**—Those who reject devolution to elective bodies suggest that Parliament may be made more effective by reforms of procedure. (1) In lieu of second readings of bills fully drafted, resolutions might be discussed, which would be followed by bills if accepted. (2) The present committee system should be replaced by the use of smaller committees, maximum membership thirty, attached to each important department of State. These committees should be advised by civil servants directly, and be encouraged to amend in a co-operative rather than party spirit. (3) A drafting committee should be appointed, aided by experts, to attend to all drafting amendments, and to put in form private members' bills, when their principles have been approved on discussion of resolutions. (4) The passing of financial resolutions on ordinary bills involving incidental expenditure and their approval on report should be dropped, as merely affording occasions for repetition of second reading arguments, and affording no control of finance. (5) The report and third reading stages should be shortened as a result of more careful consideration in committee and by the drafting committee (*i*).

In the case of financial business the creation of a Finance Committee is suggested to examine estimates and report to the House, aiding the Government in devising economies while not opposing its principles. It is possible also that some time could be saved through reducing the duplication of work in Committee of Supply and in Committee of Ways and Means, and the Appropriation Bill might be very summarily discussed, as all the actual provisions thereby made have already been accepted by the House. Certainly the formal divisions on the last two days of supply are inexcusable, merely serving to conceal in many cases the frequent absence of members from other divisions.

Of these suggestions the most interesting is the development of the committee system which might be extended, so that each committee might undertake the continuous investigation of issues within its sphere, suggesting legislation, and watching its effect, aiding the

(*h*) See *Ferrier v. Scottish Milk Marketing Board*, [1937] A. C. 126.

(*i*) W. I. Jennings, *Parliamentary Reform* (1934); H. Finer, *Modern Government*, ii, 882 ff.

ministry in the use of its delegated legislative power (*k*), and affording to private members of the House the opportunities for useful service now denied. But such a project naturally is strongly opposed by ex-ministers even of the Labour party, on the score that it resembles the committee system of the French Parliament, which is destructive of ministerial responsibility and produces unbalanced budgets (*l*). It is, however, probably a fair reply to this contention that the position in France really depends on the absence there of the two party system, which in the view of the supporters of the committee system is essential for successful administration.

A minor reform would be a time limit for speeches, brevity being an essential merit unknown to most parliamentarians. Much has already been done by delegating legislative power to the executive, but that process has dangers. The Labour party doctrine (*m*) that economic revolution is to be effected by Orders in Council, exempt from judicial control under an Emergency Powers Act, forced through the Lords by creating peers, is revolutionary and destructive of democratic rule, which essentially involves compromise.

(*k*) See Part III., Chap. V., *post*.

(*l*) Lees-Smith, *Manchester Guardian*, May 25, 1934.

(*m*) Jennings, *Parliamentary Reform*, pp. 114, 115 a view inconsistent with insistence on justice and order (pp. 13, 14).

## PART III.

### The Executive.

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#### CHAPTER I.

##### THE CROWN.

**The Members of the Executive.**—The supreme executive power is vested in the Sovereign, and the most important executive acts are done in his name. In practice the Crown has always needed both advice and aid, and it now acts upon the advice of its ministers, and in the higher branches the executive business of the country is carried on by the various Government departments, in accordance with the general policy determined upon by that special group of ministers known as the Cabinet. The heads of the more important departments form the Ministry, and are nominated by the Prime Minister from amongst the leading members of his party; the principal of these, with the Prime Minister at their head, constitute the Cabinet.

The principal members of the executive may be enumerated as follows:—

- (1) The Crown.
- (2) The Privy Council with a President.
- (3) The Ministry and the Cabinet.
- (4) The Lord Chancellor.
- (5) The Lord Privy Seal.
- (6) The Political departments of State, including the Secretariat, a group with distinct characteristics, and a number of other Ministries:—

The nine principal Secretaries of State are the Home Secretary, the Foreign Secretary, the Colonial Secretary, the Secretary of State for India, who since April 1, 1937, is also Secretary of State for Burma, the Secretary of State for War, the Secretary of State for Air, the Secretary of State for Scotland, and the Secretary of State for Dominion Affairs. These are the political heads of the corresponding departments of State.

There are also the Admiralty Board, the Treasury, the Board of Trade, Ministries of Labour, Health, Agriculture and Fisheries, Pensions, Transport, Co-ordination of Defence, the Board of Education, the Commissioners of Works and Public Buildings, and the Postmaster-General.

- (7) The Law Officers of the Crown, viz., the Attorney-and Solicitor-General for England, and the Lord Advocate and Solicitor-General for Scotland.
- (8) The Chancellor of the Duchy of Lancaster.
- (9) The non-political departments (a).

*The Crown.*

**The Title to the Crown.**—The Anglo-Saxon kings were elected by the Witenagemot, but it was customary to choose a member of the late king's family, though not necessarily his hereditary successor by right of primogeniture. In 1066 the royal line was wholly passed over in favour of Harold, as earlier of Canute. Similarly the Conqueror submitted to an election by the Witan to fortify his title by right of conquest. Gradually the importance of election and coronation diminished, whilst the doctrine of hereditary right and feudal ownership (b) became more firmly established, and in 1272 Edward I. commenced to reign four days after Henry III.'s death, before his coronation, which did not take place until August 19, 1274. His son Edward II. commenced to reign from the day after his father's death; Edward VI. from the moment of death. From this point until the Act of Settlement, 1701, the title to the Crown fluctuates between Parliamentary grant and hereditary right. Richard II. was forced to resign in 1399, and the Crown, if not then, at least in 1406, was entailed by Parliament on Henry IV. and his heirs (c). He asserted also his right by descent from Henry III., a claim tenable only on the theory that Edmund Crouchbank was the elder son of that monarch. Edward IV., 1461, claimed the Crown by hereditary right as the nearest male representative of Edward III., but also by agreement with Henry VI. made by his father in 1460, and enforced his right by force of arms. Henry VII., 1485, claimed the Crown partly by allegation of hereditary right and partly by right of conquest, but permitted his title to be fortified by statute (d). James I., 1603, claimed by descent from Henry VII.'s daughter, Margaret, and, in spite of the exclusion of the Scots line with Parliamentary sanction (e) by the will of Henry VIII., Parliament acknowledged his title by passing an Act of Recognition (f).

On the flight of James II., Parliament, by the Bill of Rights, 1689 (g), declared the Throne vacant by abdication, though this was denied by James II., and settled the Crown upon William and Mary of Orange during their lives and the live of the survivor of them, the further limitations being (1) the heirs of the body of Mary, (2) the

(a) The principal of these will be found enumerated *post*, p. 193.

(b) John was the first to use *rex Angliæ* on his Great Seal. Edward IV. used *dominus Hiberniæ*, which Henry VIII. altered to *rex Angliæ et Franciæ et Hiberniæ*.

(c) 7 Hen. IV. c. 2. The usual view that this was done on accession (cf. Rot. Parl. iii, 423 434) is now doubted; Lapsley, E. H. R. xlix, 423 ff., 578 ff. It had been intended to exclude females, but this idea was dropped.

(d) 1 Hen. VII. c. 1.

(e) 28 Hen. VIII. c. 7; 35 Hen. VIII. c. 1.

(f) 2 (vulgo 1) Jac. I. c. 1; Tanner, Const. Doc. of James I., pp. 6—10.

(g) 1 Will. & Mar. sess. 2, c. 2. See Hallam, Const. Hist., iii, 89 ff.

Princess Anne of Denmark and the heirs of her body, (3) the heirs of the body of William. In the year 1701 further limitations became necessary in order to provide for the event of Anne's dying without leaving issue, which seemed probable, and the Act of Settlement (*h*) was passed, under which the Crown was settled upon Sophia, widow of the Elector of Hanover, and daughter of Elizabeth, Queen of Bohemia, who was the daughter of James I., and the heirs of her body.

On the death of Queen Anne in the year 1714, leaving no issue, these limitations took effect and, Sophia being dead, the Crown devolved upon her son, George I. From George I. the Crown descended lineally to George II., to his grandson, George III., and to George IV., and from the latter to his brother William IV., in the year 1830, from whom it descended to Queen Victoria, daughter of the Duke of Kent (died 1820), and Victoria, daughter of the Duke of Saxe-Coburg, niece of William IV., in 1837, and from the latter in 1901 to her eldest son, Edward VII., from whom it descended in 1910 to George V., the surviving son of Edward VII., and from him to his eldest son, Edward VIII.

**The Abdication of Edward VIII.**—Most unexpectedly the reign of Edward VIII. was terminated by abdication. This first voluntary vacation of the throne was caused by his refusal to sacrifice his desire to marry a lady who had twice divorced her husbands, in the second instance as recently as October, 1936, to the urgent advice of the Governments of the United Kingdom and the Dominions, in all of which marriage in such a case would have been widely disapproved on religious and moral grounds. The suggestion of a morganatic marriage was also rejected by these Governments as foreign to English law and to the feelings of the people (*i*). The King declined to attempt to resist the ministry, and instead, on December 10, 1936, intimated his desire to abdicate and to renounce the royal succession for himself and issue. Effect was given to his desire by the enactment of His Majesty's Declaration of Abdication Act, 1936, which he assented to on December 11, and under which the Crown passed at once to George VI., his brother. The Act was expressed to be passed with the assent of Australia, New Zealand, and the Union of South Africa, and on the request and consent of Canada. The assent of the Parliament of the Commonwealth was given contemporaneously with the abdication, but the difficulty of securing the meeting of Parliament rendered it necessary in Canada to fall back on the procedure of s. 4 of the Statute of Westminster, Parliament approving in January the step taken, and enacting the substance of the Imperial Act in an Abdication Act, 1937. New Zealand accepted the Imperial Act as sufficient in law when enacted with her assent. The Union of South Africa, however, held that abdication of the sovereignty of the

(*h*) 12 & 13 Will. III. c. 2. The Acts of Union with Scotland (6 Anne, c. 11) (1707) and Ireland (39 & 40 Geo. III. c. 67) (1800) make the rule of succession applicable to the United Kingdom. See p. 11, *ante*. Any future change requires the concurrent action of all the Dominions: 22 & 23 Geo. V. c. 4, Preamble.

(*i*) See Mr. Baldwin, 318 H. C. Deb. 5 s. 2186—2196; 1 Edw. VIII. c. 3; Keith, *The British Cabinet System, 1830—1938*, pp. 366 ff.

Union took effect from the date of signature, December 10, and, as the Imperial Act could not take effect in the Union under the Status of the Union Act, 1934, s. 2, unless extended thereto by Union legislation, it was felt necessary to legislate by H.M. King Edward the Eighth's Abdication Act, 1937, to legalise *ex post facto* everything done in the name of Edward VIII. up to the passage of the Act in January (*k*). The Irish Free State did not assent to British legislation, but eliminated the Crown from all concern with internal government, and authorised it to act in certain matters of external affairs by the Constitution (Amendment No. 27), Act, 1936, and the Executive Authority (External Relations) Act, 1936, accepting in the latter Act from December 12, 1936, the transfer of the throne to George VI. These Dominions thus asserted in legal form the divisibility and temporary division of the Crowns (*l*).

**The Rules of Descent.**—The present legal aspect, then, of the descent of the Crown may thus be stated:—In the absence of statutory limitations the mode of devolution is governed at common law by the feudal rules of hereditary descent formerly applicable to land, subject to the distinctions (1) that in the case of daughters the eldest alone inherits and her issue, the Crown not descending to all the daughters equally as coparceners (*m*), (2) that the old rules relating to the exclusion of the half-blood do not apply (*n*). At common law, therefore, the Crown descends lineally to the issue of the reigning Sovereign, males taking before females, and subject to the right of primogeniture, children representing their deceased ancestors, *per stirpes in infinitum*. Upon failure of lineal descendants, the Crown passes to the nearest collateral relation of the blood royal (*o*). The right of inheritance is, however, subject to be defeated by Parliamentary enactment (*p*), in which case the Crown descends according to the statutory provisions, but, subject to these, retaining its hereditary qualities as at common law. It may in fact be said that the old elective and hereditary principles, which appear in the early form of coronation service, still apply to the descent of the Crown.

**Accession and Coronation.**—In consequence of the legal maxim that *the king never dies* (*Calvin's Case* (*q*)), on the demise of the Crown the person who succeeds is entitled to exercise all prerogative rights before coronation. The accession of the new Sovereign is,

(*k*) In strict law the accession of George VI. as sovereign of the Union took place on December 11, by reason of the terms of s. 5 of the Status of the Union Act, 1934, applying the British succession rules to the Union, and the British Abdication Act. But this fact was ignored in the Union Act, as it ran counter to the claim of General Hertzog that only under Union legislation could the sovereignty be changed. See Keith, *Journ. Comp. Leg.* xix, 105 ff.

(*l*) Keith, pp. 106 ff.

(*m*) A proposal to enact this rule was rejected as needless in 1936.

(*n*) See 1 Bl. Comm. (14th ed.) 192, 193; 25 Edw. III. st. 1; *Willion v. Berkley* (1561), Plowd. 223, 245.

(*o*) See *ib.* The present order is Princess Elizabeth, Princess Margaret Rose, the Duke of Gloucester, the Duke of Kent, and his issue, the Princess Royal, her sons, &c.

(*p*) Succession to the Crown Act, 1707 (6 Anne, c. 41), ss. 1—3; His Majesty's Declaration of Abdication Act, 1936 (1 Edw. VIII. c. 3), s. 1 (2).

(*q*) (1608), 7 Co. Rep. 10 b, 11.

however, customarily announced to the public as soon as conveniently may be after the former Sovereign's death, or, in 1936, abdication, by means of a proclamation issued by the lords spiritual and temporal, assisted with members of the late Sovereign's Privy Council, and other principal gentlemen of quality, with the Lord Mayor, aldermen, and citizens of London (*r*), representing the former meeting of the Witan or *Commune Concilium* to elect the King. A conspicuous feature of the proclamation of George VI. on December 12, 1936, was the presence of the High Commissioners for the Dominions, with the significant exception of the Irish Free State.

Like proclamations were made in 1936 throughout the Empire, again with the exception of the Irish Free State, where the royal accession was simply legalised by the Executive Authority (External Relations) Act, 1936.

The title to the Crown is completed and religious approval is accorded by the following ceremonies:—

- (1) A declaration against transubstantiation, required by the Act of Settlement (*s*), was taken before the two Houses of Parliament by Edward VII. on February 14, 1901, as since George III.'s time, the alternative being at the Coronation. But, as now prescribed by the Accession Declaration Act, 1910, a new form is provided:—"I do solemnly and sincerely, in the presence of God, profess, testify and declare that I am a faithful Protestant, and that I will, according to the true intent of the enactments which secure the Protestant succession to the throne of my realm, uphold and maintain the said enactments to the best of my powers according to law." This was taken by George V. in 1911.
- (2) A subscription to the oath for the security of the Established Church in England and the Presbyterian Church in Scotland, required by the Act of Union with Scotland (*t*). The former must be taken at the coronation, the latter at accession; Edward VII. took it immediately after addressing the Privy Council, which followed on his proclamation, and after it the councillors were sworn in. Similarly in George V.'s case (*u*), in that of Edward VIII., and of George VI. on December 12, 1936.
- (3) A coronation by the Archbishop of Canterbury, when the following essential ceremonies are observed:—
  - (a) A presentation by the Primate and recognition by the people in the presence of the hereditary officers of State.

(*r*) For the form of proclamation used on the accession of King George V., see the supplement to the *London Gazette Extraordinary*, May 7, 1910. A facsimile of that of George VI. was issued as a Stationery Office publication; also as a *Gazette Extraordinary*, December 12, 1936. For Edward VIII., see *Gazette Supplement*, January 21, 1936.

(*s*) 12 & 13 Will. III. c. 2, s. 2. The form of declaration was provided by 30 Car. II. st. 2, c. 1.

(*t*) Union with Scotland Act, 1707 (6 Anne, c. 11), Art. xxv, ss. 4, 8.

(*u*) *London Gazette Extraordinary*, May 7, 1910.

- (b) The administering of the coronation oath as required by the Act of Settlement (*x*).
- (c) An anointing by the Primate.
- (d) Coronation by the Primate, and enthronization.
- (e) Homage by archbishops, bishops and peers (*y*).

In 1911, George V. was crowned also at Delhi with an imperial Crown specially made, and in 1937, the King-Emperor's intention to visit India later on was announced (*z*).

Formerly on the demise of the Crown a proclamation was issued by the new Sovereign retaining old servants of the Crown in office, but this is now unnecessary, the Demise of the Crown Act, 1901 (*a*), providing that the holding of any office under the Crown shall not be affected by the demise of the Crown.

**The Royal Titles.**—The Crown was given express statutory authority on the union with Ireland by proclamation to determine the royal style and titles of the Imperial Crown of the United Kingdom and its dependencies (*b*). By the Royal Titles Act, 1901 (*c*), the King was empowered by proclamation to make such addition as might seem fit, with a view to the recognition of the colonial dominions beyond the seas. This was accordingly done by proclamation of November 4, 1901 (*d*), the words "and of the British dominions beyond the seas" being added after the word "Ireland." The royal title was then, therefore, "George V. by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the seas King, Defender of the Faith, Emperor of India." By

(*x*) The form of coronation oath is that prescribed by 1 Will. & Mar. sess. 1, c. 6, and is made obligatory by the Act of Settlement, 1701, s. 2. This form, with some slight modifications, was used on the coronation of King Edward VII. (*The Times*, August 11, 1902); Robertson, *Sel. Stat.*, pp. 118—120; and of George V. Edward VIII. agreed to revise the oath in view of the new status of the Dominions, and at the desire especially of the Union of South Africa, George VI. agreed to take a special oath for their Government. The oath now runs: "Will you solemnly promise and swear to govern the peoples of Great Britain, Ireland, Canada, Australia, New Zealand, and the Union of South Africa, of your possessions, and the other territories to any of them belonging or pertaining, and of your Empire of India according to their respective laws and customs." The changes made are: (1) to assert the equality of the Dominions and the United Kingdom; (2) to omit the assertion of subordination of the Dominions to parliamentary legislation. Further, in the oath, the obligation to maintain the Protestant reformed religion established by law is confined to the United Kingdom. These changes are clearly illegal unless enacted by statute, so that the King's oath to obey the law is itself a violation of law: Keith, *The King, the Constitution, the Empire, and Foreign Affairs*, 1936—1937, pp. 13—21.

(*y*) Various offices exist with claims to take part in the ceremony; these claims are dealt with by a Court of Claims, now constituted as a royal commission; see Coronation Proclamation, July 22, 1910; Wollaston, *Coronation Claims* (2nd ed.). One case was decided by the House of Lords, the Standard Bearer of Scotland, *Lauderdale v. Scrymgeour-Wedderburn* (1908), 45 Sc. L. R. 949; reversed, [1910] A. C. 342. A Court was constituted in 1936 for Edward VIII.'s coronation, and another for George VI.'s coronation, but it was authorised to accept as final the issues disposed of by its predecessor; see Coronation Proclamations, May 28, 1936, and March, 1937.

(*z*) It was made clear that this could not be done in the winter of 1937—38, nor is it yet fixed. Visits in State to Scotland and Northern Ireland were arranged in 1937, and to Canada in May, 1939.

(*a*) 1 Edw. VII. c. 5.

(*c*) 1 Edw. VII. c. 15.

(*d*) See the *London Gazette*, November 4, 1901; S. R. & O., Rev. 1904, i, 1.

(*b*) 39 & 40 Geo. III. c. 67, Art. 1.

proclamation of May 13, 1927, under the Royal and Parliamentary Titles Act, 1927, the royal title (*e*) is now "George VI. by the Grace of God of Great Britain, Ireland, and the British Dominions beyond the seas King, Defender of the Faith (*f*) Emperor of India." The King also was titular King of France from Edward III. to George III., who discontinued the style in 1801, but took that of King of Hanover in 1816; it was lost under the Salic law in 1837. Though the title of Emperor is used primarily in respect of India, the King is an Imperial Majesty and his dominions an empire under statute (*g*). In recent treaties, as in the Egyptian alliance of August 26, 1936, the phrase "King and Emperor" is freely used, though the treaty is in respect of the United Kingdom (*h*). The King also bears the hereditary title of Earl of Dublin, conferred by Queen Victoria by letters patent in 1849, and is by inheritance Duke of Lancaster (*i*), and Duke of Cornwall until an heir apparent is born.

**Incapacity of the King.**—When the King was abroad it was formerly the practice to appoint Lords Justices as in 1719 (*k*), but that is now unnecessary. On the insanity of George III. in 1811 the Lords and Commons by resolution (*l*) authorised the issue of letters patent without a sign manual warrant to Commissioners to assent to the Regency Bill. On the last illness of George IV. an Act (*m*) allowed the sign manual to be affixed by stamp on his command in his presence. In 1928 on the severe illness of King George V. he presided in Council when the issue of a warrant was authorised to pass a commission under the Great Seal empowering any three of the Queen, Prince of Wales, the Duke of York, Archbishop of Canterbury, the Lord Chancellor, and Prime Minister, appointed Counsellors of State by the Order in Council, to summon councils, and sign documents for the King. They were not to dissolve Parliament, grant a peerage, nor to act in any matter where the King signified, or it appeared to them, that the King's special

(*e*) S. R. & O., 1927 (No. 422), p. 325.

(*f*) Title given by Leo. X. in return for Henry VIII.'s book against Luther, but withdrawn by Clement VII.; given again by 35 Hen. VIII. c. 3. Its omission in Edward VIII.'s declaration of abdication caused comment, but may have been inadvertent. But in an announcement (February 20, 1937) of the title of the King to be used in the coronation service its renewed omission together with that of "By the Grace of God" suggested a definite renunciation of any claim of divine authorisation which might be regarded as inconsistent with Edward VIII.'s action in abdicating. The title of Defender of the Faith, of course, cannot be abrogated without legislation to which by the Preamble of the Statute of Westminster, 1931, all the Dominion Parliaments must assent, and in view of protests the use of the title was retained in the Archbishops' and bishops' homage in the service.

(*g*) 24 Hen. VIII. c. 12; Bill of Rights, 1689; 39 & 40 Geo. III. c. 67; Royal Titles Acts, 1876 and 1901. The title Empress was assumed under 39 & 40 Vict. c. 10, by Proclamation, April 28, 1876. On the amazing hostility to it, see Monypenny and Buckle, Disraeli, ii, 790—798, 802—817.

(*h*) Parl. Pap., Cmd. 5270.

(*i*) The title is said to merge in the Crown, but Edward VII. insisted on his right to it: Keith, The King and the Imperial Crown, p. 14. The revenues are his.

(*k*) 44 Com. Journ. 37—42. Provision by 7 Will. IV. & 1 Vict. c. 72, was repealed by 1 Edw. VIII. & 1 Geo. VI. c. 16.

(*l*) 66 Com. Journ. 79—81.

(*m*) 11 Geo. IV. c. 23. Authority to relieve the Queen of the necessity of signature of army commissions was given in 1862.

approval should be obtained (*n*). A like arrangement was contemplated in 1936, but the King died the same day. Permanent provision for royal disability not amounting to incapacity or absence, desirable for Dominion tours, such as that in Canada in May, 1939, is made by the Regency Act, 1937. It allows delegation by letters patent to counsellors of State of such powers as may be specified, but no power to dissolve Parliament otherwise than on the express instructions of the Sovereign (which may be given by telegraph), or to grant any rank, title or dignity of the peerage may be delegated. The Counsellors shall be the royal spouse and the four next in the succession, excluding any person who would be disqualified from being Regent, and they shall act jointly or by such numbers and on such conditions as may be specified. Here the inconvenience of the term "domicile" noted below appears, for there are four persons whose domicile must be enquired into. The Regent is given like powers to delegate. The delegation ceases on the demise of the Crown or the occurrence of any events necessitating a Regency, or change of Regent.

**Regency.**—The precedents as to a regency show entirely without doubt that (1) the King has no power to establish a regency for his minor successor; (2) the heir apparent cannot exercise a regency *de jure*, and that Parliament must make provision. It did so in 1327 by appointing a Council; under Richard II. it modified the constitution of his Council of Control; under Henry VI. it controlled the Duke of Gloucester, constituted in 1454 the Duke of York protector, and again in 1456. Under Henry VIII. a Regency Act (*o*) secured the control of Edward VI. In 1751 (*p*) and 1765 (*q*) Regency Acts were enacted, but never became operative. In 1788—89 Fox claimed for the Prince of Wales inherent authority to act as regent, a view held in Ireland, but denied by Pitt (*r*). The recovery of the King ended the episode. In 1811, George III.'s son became regent with limited powers (*s*). None of the subsequent Regency Acts (*t*) has become operative.

**The Regency Act, 1937 (*u*).**—This measure is intended to place the issue of a regency on a permanent basis and thus to avoid difficulties which might arise in an emergency. The age of accession is definitely fixed at eighteen; until then a regent shall perform the royal functions, including both those under prerogative and statute and the receiving of homage (*x*). There is no limitation of any kind, save of assent to any change of the succession or of the Church in Scotland (*y*). Further, a regent shall act if three or more of the

(*n*) *London Gazette*, December 4, 1928. For Irish Free State matters only the royal members acted, and in 1936 they alone were appointed.

(*o*) 28 Hen. VIII. c. 7.

(*p*) 24 Geo. II. c. 24.

(*q*) 5 Geo. III. c. 27.

(*r*) May, Const. Hist., i, 113—151.

(*s*) 51 Geo. III. c. 1.

(*t*) 1 Will. IV. c. 2; 7 Will. IV. & 1 Vict. c. 72; 3 & 4 Vict. c. 52; 10 Edw. VII. & 1 Geo. V. c. 26. In none of these Acts was Dominion concurrence suggested.

(*u*) 1 Edw. VIII. & 1 Geo. VI. c. 16.

(*x*) *Ib.* s. 8 (2).

(*y*) *Ib.* s. 4 (2).

following persons declare in writing that they are satisfied by evidence, which shall include the evidence of physicians, that the Sovereign is by reason of infirmity of mind or body incapable for the time being of performing the royal functions, or that they are satisfied by evidence that the Sovereign is for some definite cause not available for the performance of these functions. The persons qualified are the spouse of the Sovereign, the Lord Chancellor, the Speaker of the House of Commons, the Lord Chief Justice and the Master of the Rolls; in the original bill the future regent was unwisely included, but omitted (z) later. The words "for some definite cause" added in the Lords cover such a case as imprisonment, but are dangerously wide. The ministry could under them secure a regency, refusing a proposed abdication, which on the other hand might be accepted by a Dominion. The regent is the person next in the line of succession, provided he is a British subject of full age and domiciled in some part of the United Kingdom and is not a person who would, under s. 2 of the Act of Settlement, be incapable of inheriting, possessing and enjoying the throne; s. 3 of that Act is applied to him. The qualification of domicile was intended to cover the case of a prince temporarily absent as Governor-General, but is extremely unsatisfactory, as domicile in the case of a resident overseas is always uncertain, and "normally resident" would obviously have conveyed the intention, which was to include only persons really resident in the United Kingdom and attached to it.

The terms of the Act are applied to the regent so that, if he refused to act, the difficulty could be surmounted by such a certificate. If the normal regent is under age the next qualified acts until he attains full age; if he dies or becomes disqualified, the next takes his place. In any case his office ceases if a certificate is given in like manner of the recovery or availability of the Sovereign. The oaths to be taken by the regent include the maintenance of the true Protestant religion in England and in Scotland (a). This differs slightly in the point of the omission of the other parts of the United Kingdom from the royal coronation oath. Apparently it was forgotten that the Church of England is established in the Channel Islands and the Isle of Man, though not in Northern Ireland, and that on the other hand it has been disestablished in Wales, which is still an integral part of England. But the Act, passed in haste, is clearly unsatisfactory. Though informally discussed with the Dominion Prime Ministers in 1935 it was not formally agreed upon. The Dominion Governments and that of India are to be informed of any declaration under s. 2 of the Act, but otherwise the position of the Dominions was left undefined. It is in fact clear (b) that the Act is law for Australia, and New Zealand, that it has no effect in Canada under s. 4 of the Statute of Westminster, 1931, nor under the Status of the Union Act, 1934, in the Union of South Africa which has reserved

(z) See Keith, *The Scotsman*, February 4, 1937 (adopted 319 H. C. Deb. 5 s. 1810); *The King, the Constitution, the Empire, and Foreign Affairs, 1936—1937*, pp. 13—21.

(a) Regency Act, 1937, s. 4 (1), Sched.

(b) Keith, cited 319 H. C. Deb., 5 s. 1853 f.

the right to legislate if the need ever arises, and that the Irish Free State was and Eire now is in a position to decide for itself what to do if occasion arose to use the services of the Sovereign for external affairs, issues in which alone authority to act is given to him by the Executive Authority (External Relations) Act, 1936. Guardianship is not necessarily to be associated with the office of regent though he is to administer the royal property (c). If the sovereign is unmarried and under age eighteen, his mother, if living, will be guardian; if married and under eighteen or declared incapable the wife or husband shall be guardian.

**The National Flags.**—The King by prerogative and statute (d) alike determines the armorial bearings and flags. His royal standard may not be displayed save where he is present (e). The Union Jack is the normal national flag, the white ensign the flag of the royal navy, the blue ensign that of merchant vessels commanded by Royal Naval Reserve officers with Admiralty authority, and the red ensign that of all other merchant vessels (f). There is a Royal Air Force flag and a Civil Aviation flag.

**The Civil List.**—In return for the surrender of the hereditary revenues (g), George V. received a civil list by the Civil List Act, 1910 (h), of £470,000 a year (privy purse, £110,000; household, £125,800; expenses, £193,000; works, £20,000; royal bounty, £13,200; unappropriated, £8,000). Queen Mary receives since the predecease of the King, £70,000 a year. Edward VIII.'s civil list fell to £410,000 nominal, but of this £40,000 was to remain undrawn while he was unmarried, and £79,000 was to be drawn from the Duchy of Cornwall, £25,000, the rest of the revenues thence, being assigned to the Duke of York in view of his extra obligations as next in the line of succession. George VI. intimated his readiness to continue the utilisation of Duchy funds for the purposes of the civil list, and asked for special provision for Princess Elizabeth, but not for the Duke of Windsor. The grants are privy purse, £110,000; household salaries and retired allowances, £134,000; maintenance thereof,

(c) Regency Act, 1937, s. 5.

(d) 6 Anne, c. 11, Art. 1; 39 & 40 Geo. III. c. 67, Art. 1; Proclamations, January 1, 1801, altered by Proclamation, July 26, 1837, decided the flag and arms.

(e) The display of the Scottish standard has been expressly permitted by royal warrant of September, 1934, forbidding the Lyon King of Arms to take proceedings to penalise its use. The efforts of that official to nullify the royal wishes have evoked resentment in Scotland at the maintenance of an obsolescent office of no utility. See *The Scotsman*, November 20, 1936.

(f) Merchant Shipping Act, 1894, ss. 73, 74.

(g) See Part VI., Chap. I.

(h) 10 Edw. VII. & 1 Geo. V. c. 28; 26 Geo. V. & 1 Edw. VIII. c. 15; H. C. Paper, 74, 1935—36. The royal bounty is £1,200 used for female objects in distress by the Lady of the First Lord of the Treasury; £3,000 administered by the Lord High Almoner; £9,000 by the Prime Minister. The latter also controls the allocation of the £1,200 (since 1937, £2,500) pensions, which may be given yearly: Oxford, Fifty Years of Parliament, ii, 210—213. These pensions are given to indigent authors, scientists, historians, artists, musicians, &c., or more often to their families, e.g., to Sir W. Watson and later to his family. The increase to £2,500 was grudgingly accorded by the same Parliament which gave its members £600 a year and raised ministerial salaries without a mandate. The Poet Laureate, appointed on the advice of the Prime Minister, receives £97 a year: *ib.* ii, 219—222.

£152,800; and royal bounty, alms and special services, £13,200. Princess Elizabeth receives £6,000 up to age twenty-one, and thereafter £15,000, while the Duke of Gloucester receives £10,000 additional; these sums are a first charge on the revenues of the Duchy of Cornwall, the rest going to relieve the consolidated fund. There is elaborate provision for the contingency of the birth of a Duke of Cornwall, and for an annuity at age twenty-one or marriage for Princess Margaret Rose. The Treasury pays pensions for certain officers of the household. The Duchy of Lancaster yielded in 1937 a net revenue of £85,000. Annuities are drawn by Princess Louise, the Duke of Connaught, Princess Beatrice, and the Princess Royal, as well as by the Dukes of Gloucester and Kent (£25,000 for princes, £6,000 for princesses). In addition to the sums given in the civil list, £65,000 in the estimates of 1937—38 was allocated for royal palaces in actual occupation of the Sovereign. The Labour Party in 1936—37 pressed for the transfer of the Duchies of Cornwall and Lancaster to the Exchequer, a view shared in Queen Victoria's time by Lord Brougham. The cost of the royal family is relatively very large, but accords with the public desire for ostentatious display of imperial authority. The civil list is duly audited by an auditor *ad hoc*, now the Secretary of the Treasury, as regards disbursements falling under the control of the departments of the Lord Chamberlain, the Lord Steward, and Master of the Household.

**The Royal Family.**—For the purposes of the Royal Marriages Act, 1772 (12 Geo. III. c. 11), the royal family now of Windsor (*i*) is now composed of His Majesty King George VI., and his descendants, together with the descendants of the following persons:—(1) The late Queen Victoria; (2) the first Duke of Cambridge, seventh son of George III., and uncle of Queen Victoria; (3) the first Duke of Cumberland, fifth son of George III., and King of Hanover, though the then Duke of Cumberland and Brunswick was in 1919 deprived of his title because of his adherence to the enemy (*k*).

The Sovereign is bound by the ordinary law as regards marriage and divorce. The interest of the country in the royal succession renders it necessary that his choice of a consort should be approved by his ministers as representing the will of the electorate, as was shown in King Edward VIII.'s case in 1936 (*l*).

Under the Crown Private Estates Acts, 1800 and 1862, he may freely dispose of, and devise or bequeath, his private property how he pleases (*m*), and his representatives are free from the obligation of

(i) Proclamation, July 17, 1917, renouncing the titles of Saxe-Coburg and Gotha and Saxony (S. R. & O., 1917, No. 731, p. 147).

(k) 7 & 8 Geo. V. c. 47; Order in Council, March 28, 1919.

(l) See Keith, *Manchester Guardian*, December 4, 1936. It was there pointed out that *prima facie* grave doubt existed as to the validity of a marriage in law as the first American divorce of the lady involved seemed not to have been in the domicile of her husband and was, therefore, probably invalid in England. See Keith, *The King, the Constitution, the Empire, and Foreign Affairs*, 1936—1937, p. 6. The Duchess of Windsor was refused the style of H.R.H. given to the Duke.

(m) 39 & 40 Geo. III. c. 88; 25 & 26 Vict. c. 37.

taking out probate of his will (*n*). The Crown's private estates are subject to Parliamentary and parochial rates and taxes as the property of the subject, and these are to be paid out of the privy purse (*o*). The position of a queen regnant is the same in all respects as that of a king (*p*). The eldest son of the king inherits the title and revenues of Duke of Cornwall, the duchy having originally been conferred upon the Black Prince and his heirs, being the eldest son of the King of England, by Edward III. in 1337. He is Duke of Rothesay, Earl of Carrick, and Baron of Renfrew, Lord of the Isles, and Great Steward of Scotland under a Scots statute of 1469. He holds also the revenues of the Principality of Scotland. The title of Prince of Wales was originated by Edward I., who, upon the conquest of Wales in 1284, conferred it upon his second son Edward (*q*), subsequently Edward II. Since then it has been customary to confer the title of Prince of Wales and Earl of Chester upon the eldest son of the reigning sovereign, that is to say upon the heir apparent, but not the heir presumptive. This is effected by letters patent. The Prince has certain procedural advantages under the Heir Apparent's Establishment Act, 1795 (*r*).

By the Treason Act, 1352 (25 Edw. III. st. 5, c. 2), it is treason to compass the death of the Prince of Wales, or to violate the chastity of his wife, or of the eldest daughter, being unmarried, of the king or queen. The eldest daughter is usually given the style of Princess Royal, now held by Princess Mary.

The Sovereign's children, the children of sons of the Sovereign, and the eldest son of the Prince of Wales' eldest son are entitled to the style of "Royal Highness" (conferred by letters patent on November 30, 1917); and by a statute of Henry VIII., the king's children are entitled only to such precedence as Parliament and the Council allows (*s*). The King can introduce his sons at pleasure into the Privy Council; on his demise, however, they do not become, on one view, members of his successor's council unless sworn in (*t*). The King has by prerogative the right to control the education of any of his grandchildren, even against a parent's wish.

By the Royal Marriages Act, 1772, a measure deemed "wanton and tyrannical" by Lord Chatham, quite indefensible in principle, since it extends indefinitely to royal descendants and is not limited to those who are in reasonable proximity to the throne, no descendant of George II. (except the issue of princesses married into foreign families) may contract a valid marriage without the consent of the king or queen given under the Great Seal. But at the age of twenty-five

(*n*) 25 & 26 Vict. c. 37.

(*o*) Crown Private Estates Act, 1862, ss. 8, 9.

(*p*) See 1 Mar. sess. 3, c. 1. By the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 30, the mention of the King in statutes includes the queen regnant.

(*q*) See Hume, *Hist. of Eng.*, ii, 243.

(*r*) 35 Geo. III. c. 125.

(*s*) 31 Hen. VIII. c. 10. By this Act none but the King's children are to presume to sit at the side of the cloth of estate in the Parliament chamber, and a certain precedence above all others is conferred upon such dukes as are the King's sons, brothers, uncles, or brothers' or sisters' sons.

(*t*) Greville, *Memoirs*, iv, 274. But it may be that the Demise of the Crown Act, 1901 (1 Edw. VII. c. 5), alters this.

they may marry without such consent after twelve months' notice to the Privy Council if in the meantime the two Houses of Parliament have not disapproved of such marriage (*u*). This procedure has never been employed so far, though it is said to have been contemplated by Princess Amelia in 1808—10. The Duke of Windsor and his issue, as affected by his renunciation of the Crown, are not bound by the Act, in accordance with His Majesty's Declaration of Abdication Act, 1936.

**The Royal Consort.**—The queen consort shares in the royal coronation ceremonial (*x*), but is, in general, a subject of the King and amenable to the ordinary law, except (1) that she is free from tolls and the former disabilities of married women with regard to property and procedure, and may sue and be sued as a *feme sole*; (2) her life and chastity are protected by the law of treason during her marriage with the King. She is entitled to be represented in the Courts by her own attorney- and solicitor- general, but these officers were not appointed by Queens Mary and Elizabeth. The queen dowager ceases to be protected by the law of treason, but is said to preserve other privileges. She is usually styled Queen Mother, if she so desires. As Anne Boleyn's case shows, a queen accused of treason is triable by the peers (*y*).

The position of a king consort has varied at different times. When Queen Mary married Philip of Spain, it was statutorily provided that the Queen was to enjoy all the prerogatives and exercise all the powers of the Crown as sole Queen. Official documents were, however, to be executed in their joint names (*z*). William III. declined to be king consort or his wife's gentleman usher, and it was provided by statute that the regal power was to be vested solely in and be exercised solely by his Majesty in the joint names of both their Majesties; a special Act was necessary to allow her to exercise regal power during his absence (*a*), and Parliament was not deemed dissolved on her death (*b*). The Crown was limited to the King and Queen to hold during their joint lives and the life of the survivor of them (*c*).

(*u*) 12 Geo. III. c. 11; *The Sussex Peerage* (1844), 11 Cl. & F. 85; George III.'s treatment of the Duke of Sussex was extremely discreditable: May, *Const. Hist.*, i, 176—183; C. Mackenzie, *The Windsor Tapestry*, pp. 302—314. His second marriage to Lady Cecilia Buggin was in some degree recognised by the lady in 1840 being made Countess of Inverness. It is not clear why he did not in this case apply to the Privy Council. For Princess Amelia, see *ib.* pp. 319—323. The Duke of Cambridge's wife was never legally in that position, as the duke married without royal sanction from his cousin, Queen Victoria: Mackenzie, pp. 340—347; cf. Keith, *Journ. Comp. Leg.* xix, 106. On the power to control education, see the view of the judges in 1718: 15 St. Tr. 1195.

(*x*) Not, however, as of right; see *Queen Caroline's Claim to be Crowned* (1821), 1 St. Tr. (N. S.) 949. The King's omission of her name from the liturgy was perhaps illegal; and ministers, despite their disgraceful subservience, finally dropped the bill to deprive her of title, prerogatives and rights, and to dissolve the marriage: May, *Const. Hist.*, i, 88—90.

(*y*) Hallam, *Const. Hist.*, i, 31 ff.

(*z*) 1 & 2 Ph. & M. c. 10.

(*a*) 2 Will. & Mar. c. 6.

(*b*) *Parl. Hist.*, v. 867.

(*c*) 1 Will. & Mar. sess. 2, c. 2; Burnet, *Hist.* i, 820.

The consort of Queen Anne became a naturalised British subject by statute in 1702 (*d*), and was also introduced to the Privy Council, but not sworn. The precedent was followed in Prince Albert's case (*e*), and he was given in 1840 precedence immediately after the Queen (*f*), and was accorded the title of Prince Consort by letters patent in 1857. He was not made a peer.

**The Forms of, and Responsibility for, Royal Acts.**—There are many actions which the King does by word of mouth. The most important acts of State are thus approved, even if formal record is made thereafter. Among these is the appointment of the Prime Minister. Though it may be done by correspondence, the normal mode now is clearly for the Sovereign at an interview (*g*) to give the commission to form a ministry when the proposed Prime Minister has expressed his ability successfully to do so. He then kisses the royal hand on appointment. For such action responsibility rests not with the King but with the Prime Minister. The reasons for this state of affairs, which has not gone without question, are cogent. In the first place, in the House of Commons as in the Lords, the use of the King's name is improper and no Speaker could allow criticism of the King (*h*). Secondly, the fact that the King cannot be present is sufficient to render it impossible, without flagrant impropriety, for him to be assailed in the House. Thirdly, to place responsibility on the minister accords with the facts. The King chooses him because he has an assurance that he can secure a majority in the Commons, either forthwith or by a dissolution. That can be seen easily from Dominion practice, where cases of action against the wishes of an existing Premier are known. Thus, when Lord Chelmsford refused in 1907 to swamp the upper house in Queensland at the request of Mr. Kidston, he did so knowing that Mr. Philp would accept office (*i*); when Lord Byng refused the advice of Mr. Mackenzie King to dissolve the Canadian Parliament in 1926, it was because he had an assurance from Mr. Meighen that he could carry on the administration (*k*), and Sir Philip Game could not have dismissed Mr. Lang in New South Wales in 1932 without knowing that Mr. Stevens would step into the breach and win an election (*l*).

**Acts done in Council.**—Other royal acts are more formal. These include the making of Orders in Council, as explained below (*m*).

(*d*) 1 Anne, c. 2, which made it clear that he was not subject to the restrictions of the Act of Settlement, 1701.

(*e*) 3 & 4 Vict. cc. 1, 2. Cf. Greville, *Memoirs*, iv, App., *London Gazette*, March 6, 1840.

(*f*) The proposal to accord this by statute foundered on the opposition of the Duke of Cumberland: cf. *Letters of Queen Victoria*, ser. 1, i, 196 ff.

(*g*) This should be done in England or Scotland. Edward VII.'s action in commissioning Mr. Asquith at Biarritz in 1908 was unconstitutional: Lee, *Edward VII.*, ii, 579 ff.

(*h*) Cf. 228 Hansard, 3 s. 2037; 149 H. C. Deb., 5 s. 44.

(*i*) Keith, *Responsible Government in the Dominions* (1928), i, 165, 184, 460, 461.

(*k*) *Ib.* i, 146—152.

(*l*) Keith, *The Dominions as Sovereign States*, pp. 208, 226 f., 230 f.

(*m*) See p. 141, *post*.

The King also declares the President of the Council, and the President of the Board of Education, as well as passing an Order to appoint the Minister of Agriculture, and hands to new ministers seals of office where these are used. Responsibility rests in all cases with some minister. Orders in Council must be proposed by, and responsibility for them accepted by, a minister; otherwise the Lord President would not submit them to His Majesty. If the matter is important, the business should previously have been explained, or at least the minister concerned must be present to explain if required. Proclamations, whose nature has been described below (n), are also issued on the authority of Orders in Council, but they differ in one point of interest from Orders. The latter are not signed by the King, but proclamations bear the royal signature.

**Sign Manual Commissions.**—These documents are regularly used for certain appointments of important character. Thus, the Governor-General of India, the Governors of the Provinces, and the Governor of Burma are so appointed; though not essential, the signet is affixed. In the Dominions and the Colonies, the Governors-General and Governors are appointed under the sign manual and the signet. In these cases the commission is not merely signed and countersigned by the Dominion or British minister responsible, but the signet which is the seal of the office of Secretary of State is affixed, because the letters patent creating the office so demand. In the Union of South Africa the Union signet is used instead. Army officers have the second secretarial seal affixed to their commissions.

**Sign Manual Warrants.**—These documents serve many purposes. Thus, they are used in lieu of commissions for certain appointments, such as that of the Commander-in-Chief in India. They are also used for pardons to criminals. But their most interesting employment is as necessary preliminaries to other action. Thus, full powers to delegates to negotiate and conclude treaties are issued in the form of letters patent signed by the King only on the strength of a warrant countersigned by the Foreign Secretary, and instruments of ratification undergo the same treatment, responsibility thus being fixed on the minister. In matters affecting the Dominions, Canada, Australia and New Zealand, however, which still follow this mode of action, the minister, usually the Dominions Secretary, acts on Dominion request and his action is now not a ground for responsibility, at any rate in normal conditions; he could hardly sign if grave injury to the realm was involved in Dominion action. Closely akin to a royal warrant is the royal order countersigned by two Lords of the Treasury addressed to the Treasury authorising it to order the transfer from the Exchequer account at the Bank of England of the sums whose issue for purposes of public expenditure has been sanctioned by Parliament.

**Letters Patent.**—Those imposing documents bear the Great Seal of the realm, originally in full form but now the use of a wafer impression

(n) See p. 141, *post*.

is often permitted by statutory authority (o). They are used for many purposes, and there are different ways in which authority for their employment is given. The Lord Chancellor is the custodian through the Clerk of the Crown in Chancery of the seal. In the case of commissions of the peace and of circuit, the Lord Chancellor can authorise the issue. So in the case of the commissions of circuit for the winter assizes and the intermediate assize after Easter in Lancashire and Yorkshire, as regards writs of summons to peers on inheritance of peerages, and the writs of *dedimus*, conferring power on justices to administer oaths, *mittimus* authorising removal of records, and *supersedeas* staying exercise of jurisdiction. But normally the authority is a sign manual warrant, countersigned by a Secretary of State, which is sent by the Crown Office through a minister to the King with the King with the patent to be sealed and a docket explaining the purport thereof and the authority therefor. On signature of the warrant by the King, the authority to issue the letters patent is complete and they are not signed by him personally. In certain cases the Lord Chancellor countersigns the warrant; under the Great Seal Act, 1884, two Lords of the Treasury might sign, but do not in practice. In some cases further authority still is necessary. Thus, letters patent constituting colonial constitutions or the office of Governor-General or Governor must be authorised by Orders in Council, as must also be charters of incorporation of cities and other bodies. Minor purposes for which letters patent are used are the constitution of commissioners to execute the functions of the Treasury and the Admiralty, to open Parliament and to assent to bills (p), the grant of Regius Professorships in the Universities and some other important posts whose tenure is of a permanent and independent character as opposed to holding at pleasure, which in law characterises the tenure of government office, and the conferment of titles of honour such as peerages and baronetcies (q). Proclamations also pass the Great Seal.

**Writs.**—These are mandates requiring subordinate officers to perform or refrain from performing specified acts. Most judicial writs now issue under the authority of the judges and judicial seals, though in the royal name, but certain other writs the Great Seal is required. Thus, the Lord Chancellor issues such a writ summoning a peer to Parliament on succeeding to the title; if he refrains from doing so, it is because he is not satisfied of the succession and leaves

(o) 40 & 41 Vict. c. 41, s. 5; 47 & 48 Vict. c. 30, s. 2 (2); 53 & 54 Vict. c. 2, s. 1 (3); Rules, February 22, August 8, 1878; August 30, 1916; January 4, 1917; October 7, 1919; July, 25, 1927.

(p) Exceptionally the sign manual is placed on the patent, to comply with 33 Hen. VIII. c. 21, which excused royal assent verbally to Acts, as it was for the attainder of Catherine Howard.

(q) For the form, see Order in Council, May 13, 1927 (S. R. & O., 1927 (No. 425), p. 135). With letters patent there is a separate instrument or docket which is kept by the sealer as authority and which is stamped when duty is payable. It was removed by s. 30 of the Finance Act, 1937 (1 Edw. VIII. & 1 Geo. VI. c. 54), in respect of grants of titles of nobility, baronetages, knighthoods, and warrants of precedence.

it to be determined otherwise (*r*). The Speaker issues a warrant for the issue of writs on by-elections. Writs to summon a new Parliament are, in practice, issued on the authority of the Proclamation dissolving Parliament and summoning a new one, but an Order in Council is also made authorising the Lord Chancellor to issue the writs (*s*).

**Royal Instructions** are completely abnormal, for they are signed at the beginning by the King, who also initials them at the end. They are not countersigned by the Secretary of State, but they bear the signet as warrant of ministerial responsibility. Moreover, like letters patent creating the office of Governor which they normally accompany, they are approved by Order in Council. The Instructions, however, for the Governor-General and the Governors of the Indian Provinces (*t*), and the Governor of Burma (*u*) are treated in a different way. They are laid before Parliament and issued on affirmative resolutions from both Houses. This is due to the demand for Parliamentary control over the principles of Indian government.

**Former Formalities.**—The forms above set forth, complicated as they are, are much simpler than those necessary before the abolition in 1884 of the use of the Privy Seal, as an authority for the affixing of the Great Seal and other purposes (*x*). The abolition was long overdue, for the checks on royal improvidence and waste of funds were plainly out of place under responsible government and merely afforded excuses for exacting fees. Some fees seem unnecessarily to be exacted; those on dignities were abolished in 1937.

**The King's Secretariat.**—The need of a private secretary of high standing to assist the King in his duties is patent, and ever since Queen Victoria's loss of her husband's aid (1841–61), the post has been one of much public utility. It is generally agreed (*y*) that the various holders of the office have confined their efforts within constitutional bounds; if Lord Stamfordham was not in favour of Home Rule, that was normal in the royal entourage (*z*). There was general regret that Edward VIII. did not keep the services of Lord Wigram as Private Secretary, but appointed him only Keeper of the King's Archives, a post, however, as can be seen from Lord Esher's Journals, of great potential authority. On the abdication, however, he not only acted for a time as Private Secretary, but the duty of acting as political adviser was conferred upon him. It must be remembered that with the introduction of direct relations between the Dominion Governments either by correspondence or through

(*r*) A peer usually produces the marriage certificate of parents, proof of his own baptism and his father's burial, evidence from the Journals of his father taking his seat, the patent and evidence of identity. In the case of the Hindu peer, Lord Sinha, it proved difficult to issue a summons.

(*s*) See p. 47, *ante*.

(*t*) 26 Geo. V. & 1 Edw. VIII. c. 2, ss. 13 (1) and 53 (1).

(*u*) 26 Geo. V. & 1 Edw. VIII. c. 3, s. 9.

(*x*) See Anson, *The Crown* (ed. Keith), i, 87, 68.

(*y*) P. Emden, *Behind the Throne*; Keith, *The King and the Imperial Crown*, pp. 79 ff.

(*z*) Addison, *Four and a Half Years*, i, 22.

ministers or High Commissioners, in London, the duties of the Private Secretary include making certain that His Majesty has before him all relevant considerations and views of his different governments. He cannot, of course, do the work of the Prime Minister's department or the Dominions Office, but he must see that they, the Foreign Office, and any other department are duly informed. Otherwise chaotic conditions could easily arise. In the case of honours the Royal Commission deprecated the use of the Private Secretary to inform the King regarding the merits of candidates put forward by ministers (*a*). Lord Esher shows that members of the royal entourage may seek to influence the King, as on the issue of Ulster and the position of the army (*b*), and the use of civil servants has been suggested in lieu of royal freedom of choice. Lord Esher in 1913 (*c*) very strongly insisted that advice to the King could come only from his Prime Minister or the leader of the opposition, but that naturally refers only to responsible advice; the King inevitably receives unsolicited information from many sources, and is properly and regularly, if he desires, in touch with his Governors-General and Ambassadors (*d*).

Of the rest of the royal household the Lord Chamberlain's department is best known for its activity as to social functions and the work of censorship of plays, exercised through two examiners of plays. The Archbishop of Canterbury is High Almoner. There are also the departments of the Keeper of the Privy Purse and Master of the Household, the Financial Secretary's Office, the Royal Mews department, and the Household in Scotland. The Honourable Corps of Gentlemen-at-Arms and the King's Bodyguard of the Yeomen of the Guard have their counterpart in the Bodyguard for Scotland, while there are large Medical and Ecclesiastical Households (*e*).

(*a*) Parl. Pap Cmd. 1789.

(*b*) Journals, iii, 133 (September 13, 1913).

(*c*) Journals, iii, 118—121 (February 14, 1913).

(*d*) Keith, *The British Cabinet System, 1830—1938*, pp. 441 ff.

(*e*) For the political officers of the royal household, see p. 149, *post*. The Lord Steward is now not political, and the Lord Chamberlain and Master of the Horse are in like case.

## CHAPTER II.

## THE PRIVY AND CABINET COUNCILS AND THE MINISTRY.

*The Privy Council.*

**Development of the Privy Council.**—The evolution of the Privy Council can only vaguely be traced (*a*). On the whole it seems best to treat it not so much as a continuation of the Curia Regis as a creation of the needs of the King for personal advice on political issues. It therefore stands out against the Curia Regis in principle; it was dependent on the King, independent of the barons. Its development was twofold: the transformation of their mainly advisory into mainly executive functions, and the transformation of an essentially ministerial to that of an essentially baronial body. The judicial functions are not the primitive side of its work. It is noted that at the time of the minority of Henry III., when the Council begins to appear important, there was a like movement in the municipal politics. In the thirteenth century the members were personal, *domestici*, to the King, but in the fourteenth the magnates captured the Council, in the fifteenth Sir John Fortescue is found seeking to diminish baronial ascendancy, but not in favour of royal supremacy. From Henry III. the Council played an important part in government; under Richard II. its powers became defined as practically co-extensive with the prerogative during his minority. Its composition varied: under the personal rule of Richard II. feudal lords and royal servants are represented; under Henry V. and sometimes later it was composed of feudal lords; under the early Tudors of men of no great birth or estate, easily managed by the King. From this Continual Council, as it is named from 1376 onwards, we may distinguish the Great Council, which was virtually an assembly of estates less formal than a Parliament and which, up to 27 or 45 Edward III. was summoned under the Great Seal, but later under the Privy Seal; it appears last

(*a*) Baldwin, *The King's Council in England* (1913); E. R. Turner, *The Privy Council of England, 1603—1784*; Anson, *The Crown* (ed. Keith), i, 73 ff. The view adopted here is that supported by B. Wilkinson, *Const. Hist. of the Thirteenth and Fourteenth Centuries*, pp. 108—179. Cf. Lord Beaumont, *de magno et secreto consilio ipsius domini regis iuratus*, *Parl. Writs*, iii, 285; Wykeham, *clericus privati sigilli et capitalis secreti consilii ac gubernator magni concilii*, *Rot. Parl.* iii, 388. For the Lancastrian Council, especially effective from 1422—1437, see Jolliffe, *Medieval England*, pp. 456—490. By the end of Elizabeth's reign the Council was reduced to twelve great officers of state or of the household; under James I. it reached thirty-five in 1623, and often worked by Committees; Tanner, *Const. Doc. of James I.*, pp. 128, 129; Tudor, *Const. Doc.*, pp. 213—248, who (p. 253) insists that the Privy Council is not so much the continuation of the Mediaeval Council, which fell in 1641, but a development of the more political and personal branch of that body. Cf. Baldwin, p. 450.

in 1640 and 1688 when Charles I. and James II. vainly tried to use it as a royal instrument. From Henry VIII. a distinction may be traced between the Privy Council as a strong body of permanent advisers, and the ordinary Council, a larger body in which lawyers and non-lawyers might sit for special purposes. Under the Tudors the Council was more and more composed of commoners. With the disappearance in 1641 of the judicial functions of the Council, under Charles II. the members of the Council were all sworn. But the Council was not destined to be for any length of time in practice the effective adviser of the Crown, for the same tendency of evolution which had brought it into being out of a larger body resulted in the development of the Cabinet, which proved triumphant over all obstacles.

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**Functions of the Privy Council.**—The consultative and advisory functions which were formerly exercised by the Privy Council have now devolved upon the Cabinet or the heads of the various departments, and the duties of the Privy Council (except where it acts through committees such as the Judicial Committee of the Privy Council, the standing committees to advise on questions relating to the Universities of Oxford and Cambridge and Scottish Universities, on the baronetage, on constitutional matters relating to the Channel Islands, and on charters for municipal corporations (b)) are now for the most part confined to formal executive acts.

In purely executive matters also, the Privy Council has lost much of its former importance, the duties of some of the former committees of the Council having been handed over to various departments (such as the Board of Trade, the Ministry of Health, the Ministry of Agriculture and Fisheries, and the Board of Education).

Apart from the business transacted by the various committees mentioned above, the Privy Council now acts generally merely as the formal medium for giving expression to the measures determined on by the Crown on the advice of its ministers in the exercise of those executive functions which it possesses by virtue either of the prerogative or of statutory authority, *e.g.*, matters relating to the

(b) As to the standing committees on the universities, see the Universities of Oxford and Cambridge Act, 1877 (40 & 41 Vict. c. 48), ss. 3—6; the Universities (Scotland) Act, 1889 (52 & 53 Vict. c. 55); as to charters, the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 210, 211, now the Local Government Act, 1933 (23 & 24 Geo. V. c. 51), ss. 129—133. The Privy Council is also concerned with charters for universities and scientific and other learned societies, and with the administration of the Medical, Pharmacy, Veterinary Surgeons, Nurses Registration Acts (see Parl. Pap., Cd. 6535, pp. 393 ff.), Architects (Registration) Act, 1931, and Dentists Act, 1921. The Privy Council is given functions in respect of avoidance of discrimination in recognition of medical qualifications in India by the Government of India Act, 1935 (26 Geo. V. & 1 Edw. VIII. c. 2), s. 120, and in Burma (26 Geo. V. & 1 Edw. VIII. c. 3, s. 52), and is required to tender the oaths of office to the regent under the Regency Act, 1937 (1 Edw. VIII. & 1 Geo. VI. c. 16), s. 4, and to receive declarations of royal incapacity or recovery therefrom under s. 2. The Lord President was responsible for the work of the Imperial Mineral Resources Bureau and the Medical Research Council; the Committee for Scientific and Industrial Research, since December, 1916, served by a department, is subject to his care: 131 H. C. Deb., 5 s. 631; Orders in Council, July 28, 1915; February 6, 1928; an Imperial Trust for the Encouragement of Scientific and Industrial Research was incorporated November 23, 1916, and April 27, 1928.

government of Crown colonies and protectorates; the declaration of peace or war or neutrality; the regulation of international measures in war, such as blockade or contraband, or prize; and a very wide range of subordinate legislation under statute. The vast importance of the business which is thus transacted without Parliamentary sanction or discussion is noteworthy. The Council expresses the wishes of the Crown in such matters either by Order in Council or by proclamation. Orders in Council are used when new rules and regulations are approved and passed by the King in Council. Proclamations are used where it is required to give publicity to such matters as the summons, dissolution, or prorogation of Parliament, or the declaration of peace or neutrality, or war, a promulgation of blockades or imposition of embargoes on shipping in war. They are regularly authorised by Orders in Council. Three members of the Council form a quorum, four are usually summoned, they can meet wherever the King is, and the orders of the Council are authenticated by the signature of the clerk to the Council. The use of a special seal dates from 1556 and becomes obligatory as proof of genuineness by c. 1650. In the fourteenth century it had its decisions executed through Chancery or the Keeper of the Privy Seal.

Other matters transacted before the Privy Council include the administration of official oaths, the appointment to and resignation of offices under the Crown, homage by bishops, and the selection of sheriffs.

Meetings of the Privy Council are summoned by the clerk to the Council, and, except at meetings of the various committees when it is unconstitutional for him to be present (c), the King presides.

The civil and criminal jurisdictions which the Council formerly exercised were handed over for the most part to such Courts as the Star Chamber, the Court of High Commission, and the Court of Requests, and have now become merged in that of the ordinary civil Courts. The appellate jurisdiction is now exercised by the Judicial Committee of the Privy Council, established in 1833.

**Composition of the Privy Council.**—The Privy Council at present consists of the lord president, appointed by declaration of the King in Council, and about 300 members, including cabinet ministers and ex-ministers, the holders or former holders of the highest administrative, judicial and ecclesiastical offices, the leading Dominion politicians, and a few distinguished scientists or men of letters. The number is unlimited; as the distinction carries no title, but the style "Right Honourable," it is acceptable even in Dominions which object to titles of honour (d). The Archbishops claim membership by prescriptive right; the Bishop of London, the seven Lords of Appeal, the Lords Justices of Appeal, the Lord Chief Justice, the Master of

(c) See 175 Hansard, 3 s. 251.

(d) General Hertzog is an exception to this view, and, of course, Mr. de Valera. There are also a diminishing number of Irish Privy Councillors—none, of course, since 1922, who have the style, and it is used by the members of the Privy Council of Northern Ireland.

the Rolls, the President of the Probate, &c., Division, Ambassadors, and the Speaker of the Commons are usually included. The lord president is the fifth great officer of the State, and as such is often a prominent member of the Cabinet, the office being held from 1931—35 by Mr. Baldwin; it was given in 1935—37 to Mr. MacDonald; in Mr. Chamberlain's ministry it was given to Lord Runciman. The salary is £3,000, but if in the Cabinet, £5,000 a year. Privy Councillors are called to office by the invitation of the King, and may be removed by him, by striking out the name, as in the case of Mr. Fox in 1798. Removal is now rare, but Sir E. Speyer was removed by Order in Council in 1921, an innovation, as the result of his attitude in the Great War. Mr. Rhodes was retained despite his responsibility for the Jameson incursion into the South African Republic in 1895, and Mr. Thomas despite the finding of the Committee of Enquiry on Budget Disclosures in 1936 (e), and his consequent resignation of office. On becoming members of the Council they must take the oath of allegiance and the privy councillor's oath, which is recorded by 1233, and their office used to last for the life of the Sovereign and six months after (f), the old members being generally re-appointed by a new Sovereign. Apparently their position is now unaffected by a demise of the Crown.

It is provided by the Act of Settlement (g) that no person born outside the British dominions, although he be naturalized or made a denizen, except he be born of English (i.e., now of British) parents, is capable of becoming a privy councillor. But since the Naturalization Act, 1870, a naturalized alien can become a privy councillor, the British Nationality and Status of Aliens Act, 1914, s. 3 (2), not having revived the disqualification contained in s. 3 of the Act of Settlement (h).

**Status of Privy Councillors.**—Privy Councillors are entitled by letters patent (granted by James I.) to the style of "Right Honourable," and to precedence, after Knights of the Garter if commoners, next after the eldest sons of barons. The office entails no special emoluments, but their names are placed upon the commission of the peace for all counties in England; this disposes of the long controverted issues of the power of (1) the Council, (2) its committees, and (3) individual councillors, to commit offenders for trial (i). If members of the House of Commons, they do not vacate their seat on appointment to the Council *per se*, though they would have been obliged to do so on appointment prior to 1919 to any office of profit under the Crown which usually involves elevation to the rank of privy councillor. It was then provided that, if a privy councillor is appointed a Minister of the Crown at a salary without any other office being assigned to him, he is not incapable of being

(e) Parl. Pap., Cmd. 5184. It seems impossible to justify retention in such cases.

(f) Succession to the Crown Act, 1707 (6 Anne, c. 41), s. 8; and see the Demise of the Crown Act, 1901 (1 Edw. VII. c. 5), s. 1 (1), whence it may be deduced that their office is not vacated at all by the demise of the Crown.

(g) 12 & 13 Will. III. c. 2, a precaution against foreign favourites.

(h) *R. v. Speyer*, [1916] 2 K. B. 858.

(i) *Seven Bishops' Case* (1688), 12 St. Tr. 183; Hallam, Const. Hist., i, 234, 383 ff.

elected to or voting in the Commons; but not more than three such ministers shall sit as members of the House at the same time (*k*).

*The Ministry and the Cabinet.*

**Constitutional Position of the Cabinet.**—The consultative and advisory functions which formerly belonged to the Privy Council, so far as they have not been transferred to the heads of the political departments of the State, are now performed by that group of ministers known as the Cabinet, which advises the Crown in the exercise of its prerogative or statutory rights with regard to the conduct of the executive, and directs its general policy, besides being responsible for the general policy and character of the principal measures of legislation which are introduced during its tenure of office. The system is an essential feature of the Constitution (*l*) and it rests on convention (*m*), for the principle that ministers shall represent the majority of the Commons is not directly enforced by law, though it is the essential solution of the relations between Crown and people, and secures that those who in person and purse must pay for the results of policy shall by their representatives dictate its course. It may be added that, even if enacted, it would be practically impossible for any Court to enforce the law against a recalcitrant ministry, for Courts ultimately depend for the carrying out of their decisions on executive action.

**Rise of the Cabinet System.**—The essence of the Cabinet system is the presence in Parliament of the King's ministers. Parliament in 1341 and 1376, and again under Richard II., and during the premature Lancastrian constitutionalism demanded, up to 1437, the nomination in Parliament of the King's Council. But from 1459 to 1621 impeachment disappears as a mode of control of ministers. Henry VIII. in 1514 and 1523 sent ministers to persuade or browbeat the Commons (*n*), but under Elizabeth we find the Chancellors of the Exchequer and the secretaries active in debate, and the practice of adding to the constituencies and narrowing the franchise for the boroughs under their charters is a proof of the Crown's desire to have placemen in the Commons. The idea of control over ministers is adumbrated in the Grand Remonstrance of 1641, but it is not clear how far the essence of the matter was understood; the Commons, however, realised that their new weapon of impeachment was not necessarily adequate; the Commons might have objections to men as counsellors, and yet not have to accuse them of crimes (*o*). Traces of a tendency on the part of the Crown to consult with a group of the more

(*k*) Re-election of Ministers Act, 1919, s. 2. He may have duties assigned: 25 & 26 Geo. V. c. 38, s. 1 (*b*).

(*l*) See p. 13, *ante*.

(*m*) See p. 4, *ante*.

(*n*) Sir T. More advised, as Speaker, his reception, despite the resentment of the House, on Wolsey's visit in 1523 to demand £800,000; Roper, *Life*, pp. 10, 11. But the House declined to discuss the grant with him; Tanner, *Tudor Const. Doc.*, pp. 605, 608.

(*o*) Gardiner, *Const. Doc.*, pp. 153, 158; Marriott, *Crisis of English Liberty*, pp. 178, 179, 215—217.

important members of the Privy Council (sometimes termed the "Cabinet Council" or "*Junto*"), rather than with the larger and more cumbrous body itself, may be found as far back as the reign of Charles I. (*p*), but it was not until the reign of Charles II. that the practice was definitely adopted.

**The Cabinet under Charles II.**—The select committee, with whom Charles II. consulted, were known in 1671 as the *Cabal* (*q*), a group agreed on interest in trade, religious toleration, and hostility to Holland, and the system, uncontrolled by the present rules and conventions, was justly unpopular, as tending to increase the personal influence of the Crown, whilst uncertainty as to the persons from whom advice was sought rendered it impossible to fix the responsibility for mis-government. A last attempt under the advice of Sir W. Temple to restore the Privy Council to collective efficiency and responsibility in 1679 by reducing its membership from fifty to thirty selected as representing the great officers of State, the peers, and Commons, broke down at once, owing to its inherent demerits, the new body lacking all cohesion and the King falling back on an inner circle of advisers (*r*). By the close of his reign we have the Council, still taking decisions on projects of the committees, and a nascent cabinet of the most trusted advisers, who under William III. were the Lord Keeper, Lord President, Lord Privy Seal, and the two Secretaries of State, conjoined with others. William III., whose convention Parliament and that of 1695, as opposed to those of 1690, 1698 and 1701, were Whig in composition, tended to render his Cabinet more consistently of Whig complexion, but never dreamed of making it his master, and concluded the first partition treaty behind the backs of his ministers, a few of whom were then induced to carry out the necessary forms for the signature of the treaty, a matter in respect of which Somers was in 1701 impeached (*s*); he had affixed the great seal to a blank power to treat. In 1692 Parliamentary debate (*t*) showed that the lack of responsibility of the Cabinet was resented, and Somers' action had the result that two clauses were inserted in the Act of Settlement, with the object of checking its further development, but they were not to come into force until the death of Anne. The first of these provided that the old consultative functions should be restored to the full Privy Council, and (in order to

(*p*) Hallam, *Const. Hist.*, iii, 184.

(*q*) From the initials of the five privy councillors, Clifford, Arlington, Buckingham, Ashley, and Lauderdale: Ogg, *Charles II.*, pp. 327 ff. They were also known as the "Cabinet" because they met in the King's closet, all these names being terms of reproach. But there is no sign that under Charles II. unanimity in the Cabinet Council was expected. During this reign formal division in 1667 of the Council itself into committees (Foreign Affairs, Trade and Plantations, Admiralty, and Petitions) progressed, but none of these committees was used as a Cabinet. For Charles II.'s methods of control of elections and members, see W. C. Abbott, *E. H. R.*, xxi, 257. Under James I. in 1617 we find the use of a committee on foreign affairs, a practice continued by Charles I.; Tanner, *Const. Doc. of James I.*, pp. 129 ff. Cf. Turner, *E. H. R.*, xxxviii, 174—205; Privy Council of England, ii, 210—230.

(*r*) Temple, *Works*, ii, 538, 541; Turner, i, 439—448; G. Davies, *E. H. R.* xxxvii, 47.

(*s*) Hallam, *Const. Hist.*, iii, 146, 147; *Parl. Hist.*, v, 1246 ff.; Burnet, *Hist.*, iv, 469 ff.; T. Merz, *The Junto*, pp. 30 ff., 35 ff., 122 f.

(*t*) *Parl. Hist.*, v, 731.

fix the responsibility) that all resolutions come to there should be signed by the members present (*u*). The second, with the object of checking corruption, provided that no person holding an office or place of profit under the Crown should serve as a member of the House of Commons (*x*). Had this provision come into force it would have had the effect of entirely cutting off the executive from the Commons and strengthening the Lords, a result directly opposite to that desired.

**Slow Development.**—Under Anne the system develops. It becomes customary to include the heads of such departments as the Treasury and Admiralty as essential. The Queen still presides in the Cabinet of great ministers, who decide policy; she may sit in committee, but there is evidence that the Lords in Committee do virtually departmental work without her; the Privy Council sinks more and more into formal functions (*y*); solidarity of the Cabinet is more marked, in 1705–06 a Whig ministry and in 1710 a Tory ministry being called into being. Moreover the policy of 1701 was reversed; in 1705 (*z*) the clauses above mentioned were repealed, and in 1707 (*a*) the foundation of the modern distinction between political offices and civil service posts was laid in the rule that only holders of offices created before October 26, 1705, could sit in the Commons, though re-election was required. But the problem of responsibility remains: in 1711 Lord Rochester, in an effort to deal with errors in the war in Spain, declares that according to the fundamental law of the Kingdom ministers are responsible for all. But who are the persons actually responsible, and how are they to be dealt with?

**The Cabinet under the House of Hanover.**—A definite step in advance took place under George I., whose ignorance of English rendered his presence at the Cabinet meetings unsuitable, which paved the way for the evolution of the Prime Ministership, and reduced the responsibility of the Crown. George II., like his father, was more interested in Hanover than in England, and under these Kings Walpole (1721–42) consolidated a personal ascendancy due to his favour, through Queen Caroline, with the King and his skill in control by bribery in one form or other of the Commons, but disclaimed the style of First Minister (*b*). Throughout the century there is clear a distinction between the outer and the inner Cabinet; in the Grenville Ministry (1763–65) some five or so ministers dominated, Grenville, First Lord of the Treasury, two Secretaries of

(*u*) 12 & 13 Will. III. c. 2, s. 3 (4).

(*x*) *Ib.* s. 3 (6).

(*y*) The action of the Council on Anne's fatal illness in 1714 in recommending Shrewsbury as Treasurer is an interesting exception. The Dukes of Argyll and Somerset entered the Council unsummoned, an action next recorded in 1916 when Lord Milner appeared by accident. Cf. Trevelyan, *England under Queen Anne*, iii, 308. Attendance unsummoned to meetings is wholly irregular, and has only happened by accident in recent times: Anson, *The Crown* (ed. Keith), i, 107, n. 3. For Rochester, see *Parl. Hist.* vi, 971.

(*z*) 4 Anne, c. 20, ss. 24, 26.

(*a*) 6 Anne, c. 41.

(*b*) Clarendon in 1661 refused to be First Minister; Swift uses "Prime Minister" of Harley; Townshend and Stanhope were given the style: Thomson, *Secretaries of State*, pp. 16, 17.

State, the President of the Council, and the Chancellor, with at times Lord Mansfield. The Cabinet in this form had the circulation in locked boxes of all important papers, and is distinguished as the efficient Cabinet. But the honorary members remained advisers, and George III. was well able to use the lack of solidarity in the Cabinet to advance his personal control, which he supported by his management of Lords and Commons. On the other hand, the nominal members could, like Lord Mansfield in 1775, disclaim responsibility for the acts of ministries of which they had not been efficient members (c). The Duke of Grafton in 1771 became Lord Privy Seal, but stipulated that he should not be summoned to meetings of the confidential Cabinet (d). Solidarity begins to be real under Lord Rockingham in 1782, but a formal enunciation is due to Mr. Addington in 1801, when he declined to allow Lord Loughborough, whom Lord Eldon had superseded as Lord Chancellor, to continue to attend the Cabinet, and to retain his Cabinet key, on the ground that "the number of Ministers should not exceed that of the persons whose responsible situations in office require their being members of it" (e). The enunciation of the necessity of a Prime Minister, denied by George III., and repudiated by the Duke of Grafton in 1783, was made by Mr. Pitt, when Mr. Addington in 1803 suggested that they two should be Secretaries of State, with no Prime Minister, but when he held that it was "an absolute necessity in the conduct of the affairs of this country that there should be an avowed and real Minister, possessing the chief weight in the Council and the principal place in the confidence of the King. That power must rest in the person generally called First Minister" (f). Mr. Pitt's insistence on the confidence of the King was consistent with his attitude on his retirement from power in 1801, when the King was opposed to his plan for Catholic emancipation, and the King's power in 1807 enabled him to remove the Grenville Ministry and to secure the Portland Ministry in lieu; though the royal attempt to extort a promise that the Grenville Ministry would propose no further concessions to Roman Catholics was generally disapproved (g), the royal authority remained paramount down to 1830, although in 1829, George IV. had yielded to the demand that he should agree to Catholic emancipation. In 1830, the King was virtually compelled to give power to Earl Grey, and in 1834, when the King put pressure on Lord Melbourne to resign, the essential dependence of the Ministry on the majority in the Commons, produced by the Reform Act of 1832, was established by Sir R. Peel's definite acceptance of responsibility for the King's action *ex post facto*, in contrast to Wellington's refusal to do so and to the

(c) Parl. Hist., xviii, 274 f., 279.

(d) Grafton Memoirs, pp. 263, 264.

(e) Campbell, Lives of the Chancellors, vi, 326, 327. Chatham may be regarded as Prime Minister from July, 1766, to February, 1767: Chatham, Corr., iii, 22—33. But his servility to the Crown, and that of Pitt (May, Const. Hist., i, 14, 23, 67), show clearly that neither could be deemed a real rival of the royal power.

(f) Stanhope, Life of Pitt, iv, 24. For his attitude in 1801, see Parl. Hist., xxxv, 962.

(g) May, Const. Hist., i, 72—80. In 1812 all recognised that the Prince Regent's favour would determine the issue of a Tory or Whig régime.

Ministry's attitude in 1807 (*h*). Sir R. Peel's failure to obtain a majority on the dissolution given him by the King was the first occasion on which the royal favour failed to secure a majority for the Prime Minister; the reform of the franchise had freed the electorate from dependence on the Crown.

In 1841, a resolution of the House of Commons to the effect that the Whig Ministry not having the confidence of the House, "their continuance in office under such circumstances was at variance with the spirit of the Constitution" (*i*), led to a dissolution, and marked the adoption of the doctrine that the Cabinet is dependent for its existence upon the good will of the party which commands a majority in the House of Commons.

**Formation and Composition of the Ministry.**—The present practice upon the formation of a new ministry, consequent upon the dissolution of the previous ministry by resignation, and usually upon or within a few days of such dissolution (*k*), is for the Crown to call upon the recognised leader of the party which has been returned with a majority in the House of Commons to nominate his colleagues who are to occupy the most important posts at the head of the various departments of State. The discretion of the Crown is now, owing to the growth of party ties, nominal in most cases; Queen Victoria was compelled in 1855 to accept Lord Palmerston, and in 1880 Mr. Gladstone against her preference for Lord Derby and Lord Hartington respectively, and her selection, without consulting Mr. Gladstone, of Lord Rosebery in 1894, though she liked him personally, was in accord with the Cabinet's preference for him over Sir W. Harcourt. The selection of Mr. Asquith was inevitable and had his predecessor's approval. Whether Mr. Asquith advised the King in 1916 to send for Mr. Bonar Law is disputed, but is definitely attested by Lord Crewe; the action was inevitable as a first step. In 1924 and 1929, no doubt, the selection of Mr. Baldwin was advised as inevitable by the retiring Prime Minister, just as he must have advised the sending for Mr. MacDonald. Mr. Baldwin's selection in 1923 in preference to Lord Curzon was likewise dictated by party preference (*l*). In 1931, the retention of Mr. R. MacDonald was due to the policy of Mr. Baldwin who preferred to create a national ministry instead of

(*h*) 26 Hansard, 3 s., 76, 83, 89, 215—220, 223, 257; Peel, *Memoirs*, ii, 31 ff.; May, i, 98—104; iii, 16—18; Keith, *The British Cabinet System, 1830—1938*, pp. 356 ff.

(*i*) May, i, 107. It was carried by one vote only. The ministry had proposed to carry on despite a minority of thirty-six on the budget scheme, but Sir R. Peel forced the issue.

(*k*) As to the dissolution of the ministry, see p. 163, *post*. The summons to the new Premier should be made, according to Todd, within a week (*Parl. Govt.*, i, 216). But the true rule would appear to be that there should be no unreasonable delay. Parliament having, *e.g.*, in 1812, addressed the Crown where delay has occurred: 23 Hansard, 1 s., 231, 286. The present practice is for action to be taken on the same day, as in 1929, 1931, 1935 and 1937.

(*l*) Finer, *Modern Government*, ii, 955; Keith, *The King and the Imperial Crown*, pp. 122 ff.; *The British Cabinet System, 1830—1938*, pp. 7, 34. For formal responsibility for appointment, see p. 134, *ante*. In sending for Lord Hartington, not Mr. Gladstone, in 1880, the Queen acted on Lord Beaconsfield's advice: Monypenny and Buckle, ii, 1415 ff.

insisting on his clear right to become Prime Minister. In 1935, the time had plainly come for Mr. Baldwin to stand out as the real master, his nominal superior having a mere nominal following in the country; in 1937 he arranged for the undisputed succession of Mr. Chamberlain.

Upon acceptance of this task, and after kissing the King's hands, the person so called upon becomes known as the *Prime Minister* or *Premier*; his retention of the post is, in the first place, however, dependent in practice upon his ability to form a ministry, that is to say, upon his ability to find colleagues who have sufficient confidence in his control of the Commons and the electorate and in his ability to render them willing to act with him; of late years this has never caused trouble. Like the Cabinet itself, of which he is the head, the existence of the Prime Minister, who is mentioned in the Berlin Treaty of 1878, and in the schedule to the Chequers Estate Act, 1917, was unknown to and unrecognised by substantive law, until by the Ministers of the Crown Act, 1937, a salary of £10,000 was provided for the Prime Minister and First Lord of the Treasury, and a pension of £2,000, unless he draws a pension under the Political Offices Pension Act, 1869 (*m*). The pension is charged on the Consolidated Fund, but the salary is votable. His power rests on no statute. He usually fills one or other of the most important offices, such as formerly that of Secretary for Foreign Affairs, or, as is the case at present, and no doubt in future, First Lord of the Treasury. He invariably is a privy councillor, and by recent usage a member of the House of Commons. Since the year 1905 he also enjoys place and precedence next after the Archbishop of York, this status having been conferred upon the then existing and all future Prime Ministers by Royal Warrant (*n*), and *eo nomine* he appears constantly in official documents such as Parliamentary proceedings.

The Cabinet formed after the dissolution of October, 1931, comprised the holders of twenty offices, including that of Prime Minister. The others were the Lord President, Chancellor of the Exchequer, the eight Secretaries of State, Lord Chancellor, the Ministers of Health, Agriculture and Fisheries, and Labour, the Presidents of the Boards of Trade and of Education, the Lord Privy Seal, First Lord of the Admiralty, and First Commissioner of Works; in 1932 the Lord President assumed the office of Lord Privy Seal also, but in December, 1933, the Postmaster-General was given Cabinet rank, and in 1934 Mr. Eden was made Lord Privy Seal, but became Secretary of State for Foreign Affairs in 1935. In 1936—37, the Cabinet counted twenty-two members, the Postmaster-General no longer being included, but the Minister of Transport and a new Minister for the Co-ordination of Defence appearing. In January, 1939, the number was raised to

(*m*) The drawing of pensions under that Act (£2,000 or £1,200) has ceased since April 6, 1924. The last holders were J. A. Pease (Lord Gainford) and G. W. Balfour (Earl of Balfour). For the new rule, see 1 Edw. VIII. & 1 Geo. VI. c. 38, s. 4.

(*n*) See the *London Gazette*, December 2, 1905. Mr. Balfour secured the precedence as part of his policy of asserting the position of the Prime Minister: Dugdale, Arthur James Balfour, i, 370. The Prime Minister also enjoys the use of the official residence in Downing Street, and of Chequers, presented to the nation by Lord Lee of Fareham: 7 & 8 Geo. V. c. 55.

twenty-three, the Dominions and Colonial Offices being placed in separate hands after temporary combination on Lord Stanley's death; a peer was appointed Minister for the Co-ordination of Defence, with aid in the Commons from Mr. Morrison as Chancellor of the Duchy; he had given up the Ministry of Agriculture in view of his failure in that office. In 1939 neither Postmaster-General nor First Commissioner of Works was of Cabinet rank. The Cabinet list (£5,000 each) in the Ministers of the Crown Act, 1937, is, in addition to the Prime Minister: Chancellor of the Exchequer, eight Secretaries of State, First Lord of the Admiralty, Presidents of the Boards of Trade and Education, Minister of Agriculture and Fisheries, Ministers of Health, Labour, and Transport, and Minister for the Co-ordination of Defence; of these, two cannot sit in the Commons. The Ministers at £3,000 who may be in the Cabinet are Lord President of the Council, Lord Privy Seal, Postmaster-General, First Commissioner of Works; their salaries and that of the Chancellor of the Duchy, who draws £2,000 from Duchy funds, are made up to £5,000 if put in the Cabinet. The increase of salaries, attractive to future Labour ministries, clearly renders even stronger the power of the Prime Minister. Prior to 1937 salaries varied up to £5,000, and ministerial changes were thus often necessary in fairness to abler men.

In addition to these ministers and the Lord Chancellor, the Prime Minister appoints a still larger number of ministers without Cabinet rank, such as the Chancellor of the Duchy of Lancaster, Minister of Pensions, the five Junior Lords of the Treasury, and the Financial and Parliamentary Secretaries, the Civil Lord, and the Parliamentary and Financial Secretary of the Admiralty, the Law Officers, the Under-Secretaries of State (*o*), certain officers of the royal household (*p*), &c. All ministerial salaries, save that of the Lord Chancellor, are voted yearly and so open to challenge.

**General Status of the Ministry.**—The various ministers are usually appointed at a meeting of the Privy Council, by delivery of the appropriate seals or symbols of office handed back by the outgoing ministers at an earlier Council; and certain of their number are required to take the oath of allegiance and official oath, or the oath of allegiance and judicial oath in the manner provided by the Promissory

(*o*) The Ministers of the Crown Act, 1937, s. 10 (1), makes twenty-four posts rank as Under-Secretaryships: Parliamentary Secretary to the Treasury (£3,000), Financial Secretary (£2,000), Secretary for Mines, and Secretary of the Department of Overseas Trade (£2,000); Parliamentary Under-Secretaries (Admiralty (two, one being the Civil Lord), Air Ministry, Board of Education, Board of Trade, Burma Office, Colonial Office, Dominions Office, Foreign Office (two), Home Office, India Office, Ministry of Agriculture and Fisheries, Ministry of Health, Ministry of Labour, Ministry of Transport, Scottish Office, War Office (two)) (£1,500), and Assistant Postmaster-General (£1,200). Of these only twenty can sit in the Commons. For the salary of the leader of the opposition, see p. 77, *ante*.

(*p*) Since 1924 the only officers to retire on change of ministry are the Treasurer, the Comptroller, the Vice-Chamberlain of the Household, and at present two Lords in Waiting; the first three acting as government Whips. Under Queen Victoria, the unwillingness of the Queen to change the ladies of the bedchamber led to Sir R. Peel refusing to form a ministry in 1839; in 1841 she conceded the point: May, Const. Hist., i, 104; Keith, *The British Cabinet System, 1830—1938*, p. 64.

Oaths Act, 1868, and the Judicature Act, 1925 (*g*). Under the established usage (though Mr. Gladstone in 1845—46 and Sir A. Griffith Boscawen in 1922—23 afford exceptions) the members of the Cabinet are required to be members either of the House of Lords or House of Commons. Other ministers are almost invariably in the same position. Thus, despite the anxiety of the Prime Minister to retain his services, Sir W. Jowitt, Attorney-General, had to resign office when, defeated at the election of 1931, he could not be found a seat. In 1935, a peerage had to be given to a minor politician in order to supply a seat for Mr. MacDonald, defeated at Bassetlaw, and an appeal to Conservatives successfully made to find a University seat for Mr. R. MacDonald, rejected at Seaham by 22,498 votes, although he had denounced University votes. Both were for some time out of the Commons. The position of General Smuts in 1917—18 as member of the War Cabinet without a seat in the legislature was due to war conditions. It was, however, provided by the Government of India Act, 1858 (*r*), that not more than four of the Principal Secretaries of State, nor more than four of their Under-Secretaries, might sit in the House of Commons at the same time. But by the Secretaries of State Act, 1926, the number of Secretaries of State and Under-Secretaries of State capable of sitting and voting in the House of Commons was increased to six (*s*), in 1935 another Under-Secretary for the Foreign Office was provided for, and the number is now regulated as above described (*t*). In 1939 there were seven peers in the Cabinet.

Under the provisions of the Succession to the Crown Act, 1707 (*u*), the acceptance of any office of profit under the Crown (interpreted as applying to offices created prior to October 25, 1705) vacated the seat, if the person appointed was a member of the House of Commons, and a writ for a new election was to issue, though he was capable of re-election. Under the same Act, persons holding new offices (*viz.*, offices created after October 25, 1705), and certain specified offices, are altogether barred from being elected to or sitting and voting in the House of Commons, unless specially exempted (as frequently was the case, *e.g.*, the Paymaster-General) by later statute from the operation of the Act. Thus, in 1932 (*x*), it was found necessary to exempt the President of the Board of Trade, who was found to have been sitting without warrant, owing to an accidental repeal of earlier authority. It was, however, provided by the Representation of the People Act, 1867 (*y*), that the holders of certain specified offices, if members of the House of Commons, did not vacate their seats on the acceptance of any such specified offices from the Crown in lieu of,

(*g*) 15 & 16 Geo. V. c. 49, s. 12 (3). Certain other officials were included by later statutes, *e.g.*, the President of the Board of Agriculture and Fisheries under certain circumstances (52 & 53 Vict. c. 30, s. 8 (2)); and the President of the Board of Education (62 & 63 Vict. c. 33, s. 8).

(*r*) 21 & 22 Vict. c. 106, s. 4; but see 27 & 28 Vict. c. 34.

(*s*) 16 & 17 Geo. V. c. 18; 20 Geo. V. c. 9.

(*t*) 25 & 26 Geo. V. c. 35, s. 1 (*a*); see p. 149, note (*o*), *ante*.

(*u*) 6 Anne, c. 41, ss. 24, 25.

(*y*) 30 & 31 Vict. c. 102, s. 52, Sched. H.; 9 Geo. V. c. 2.

(*x*) 22 Geo. V. c. 21.

and in succession to, their former office or offices; and by the Re-election of Ministers Acts, 1919 and 1926, the necessity for re-election was first restricted and then abolished (z).

Ministers hold their offices at the pleasure of the Crown, and may be in law dismissed at any time. They retire collectively with the Cabinet upon a change of Government. Resignation could in theory be declined by the Crown, but doubtless, if persisted in, must be allowed.

**The Cabinet.**—*General Status and Functions.*—Like the Prime Minister himself, the Cabinet was until recently not recognised as a body either by the common or statute law; so much is this the case that in the year 1711 the House of Commons refused to permit the use of the words "Cabinet Council" in an address to the Crown (a), and in 1857 a proposal to give Cabinet Ministers certain priority in passing to the House of Lords was rejected by the Commons because such persons were unknown to the Constitution and possessed no legal status (b). Even now recognition is due to salary questions, as under the Ministers of the Crown Act, 1937, a distinction is made between the salaries of ministers according to Cabinet rank of their posts, and provision is made for increase of salaries when a minister holding an inferior office (e.g., Chancellor of the Duchy of Lancaster) is promoted to the Cabinet (c). The rules which regulate the relations of the Cabinet with the Crown, Parliament, and the Prime Minister, fall therefore within the sphere of conventional law, and are essentially flexible according to modifications of conditions. Its essential features are, as Lord Morley has pointed out (d), four: (1) collective responsibility; (2) subjection to the majority of the Commons; (3) composition, save in abnormal circumstances, from one party; and (4) the position of the Prime Minister as keystone of the Cabinet arch. The exclusion of the Crown from Cabinet meetings serves as the basis of the whole arrangement.

*Position of Prime Minister.*—The position of the Prime Minister rests on (1) his chairmanship of the Cabinet; (2) his leadership of Parliament; (3) his position as the essential channel of communication with the Crown on all important issues; (4) his leadership of the party and the unique prestige accompanying that status; and (5) his patronage of Cabinet and civil service posts, control of honours, and great influence in the departments of State. Of his actual power there are varying views; *primus inter pares* in the opinion of Lord Morley and Mr. Gladstone, *inter stellas luna minores* in that of Sir W. Harcourt (e), he often dominates all, as did Sir R. Walpole, Mr. Pitt, Sir R. Peel, Mr. Disraeli, Mr. Gladstone, in 1868—74. Mr. Balfour failed conspicuously to control his colleagues and Lord Salisbury

(z) See p. 62, *ante*; Ministers of the Crown Act, 1937, s. 9.

(a) See Parl. Hist., vi, 972.

(b) 118 Hansard, 3 s., 1927, 1939 ff., 1960.

(c) See p. 149, *ante*; 1 Edw. VIII. & 1 Geo. VI. c. 38, s. 3 (1).

(d) Morley, Walpole, ch. vii.

(e) App. II. in Gardiner's Harcourt, vol. ii. Cf. Oxford, Fifty Years of Parliament, ii, 183—189; Keith, The British Cabinet System, 1830—1938, pp. 75 ff.

suffered from a like defect (*f*). Mr. Baldwin, though often willing to let ministers act independently, was retentive of power. Mr. N. Chamberlain clearly dominated his Cabinet in 1938 driving Mr. Eden and Mr. Duff Cooper into resignation and relegating Lord Halifax to subordination.

*Composition of Cabinet.*—The choice of Cabinet Ministers rests with the Prime Minister, for it is not the practice to consult the Cabinet as to selection of new members, though occasional exceptions are recorded (*g*). Their number, though unrestricted and subject to a tendency to grow larger, is under the present practice generally confined to the holders of some twenty offices. Mr. Pitt had at one time six, then seven, colleagues, Sir R. Peel twelve, and Mr. Gladstone fourteen, Mr. Disraeli in 1874 only twelve. The temporary National Government of August, 1931, only consisted of ten members of Cabinet rank. Constitutional considerations render impossible the inclusion of the Archbishops or the Lord Chief Justice, who were occasionally included during the earlier period of Cabinet history (*h*), as also were persons not holding any office (*i*). Any person may, however, still be summoned to attend a Cabinet meeting (*k*), who from special knowledge or for any other reason may be considered qualified to give useful assistance or advice, and this principle has been recognised by Parliament (*l*), and was acted on very freely in the War of 1914—18. Moreover, in war conditions was tried a War Cabinet of five (*m*) members, four of whom were to be free to concentrate on war issues, while the fifth maintained touch with the Commons. But a supplementary semi-Cabinet for home issues had to be created, and, despite the pleading of Lord Haldane's Committee on the machinery of Government (*n*) for a small directing body, after the War the normal

(*f*) Cf. Dugdale, Arthur James Balfour, i, ch. xvi.

(*g*) Anson, *The Crown* (ed. Keith), i, 130. In January, 1939, it seems clear that Mr. Chamberlain did not consult his colleagues in deciding to appoint Lord Chatfield to co-ordinate defence in place of Sir Thomas Inskip, relegated to the Dominions Office, and to give charge of agriculture to a man without ministerial experience, but representing the Farmers' Union, whose opposition to Mr. Morrison's plans for agriculture had compelled his removal from the Ministry of Agriculture.

(*h*) See the instances as to the Archbishops of Canterbury in Walpole's Administration, the commander-in-chief in 1770 and 1772, and Lords Hardwicke, Mansfield, and Ellenborough, as Lords Chief Justices (Todd, *Parl. Govt.*, ii, 154, 157, 160). See also the resolutions of both Houses as to the expediency of keeping the functions of ministers and common law judges separate (which were, however, rejected) (*Com. Journ.*, March 3, 1806; *Lds. Journ.*, March 3, 1806; *Parl. Deb.*, vi, 308). For Canning's insistence on his right to select colleagues in 1827, see *E. H. R.*, xxxviii, 223, 224.

(*i*) See Todd, *Parl. Govt.*, ii, 154, 155. The practice was revived for the War Cabinet, and is recognised in the Re-election of Ministers Act, 1919 (9 Geo. V. c. 2), s. 2. It is not very desirable on the whole, for there are already sinecure offices enough, e.g., Lord Privy Seal, Chancellor of the Duchy, and even Lord President. In 1939 the first two of these offices were given real work in charge of defence against air raids and co-ordination of defence.

(*k*) It is, of course, true that formally so long as such a person is present, there is not in the strict sense, a Cabinet; see p. 153, note (*o*), *post*.

(*l*) *Parl. Deb.*, vi, 327; 142 Hansard, 4 s. 864.

(*m*) The number was for a time six; in addition General Smuts was, though in neither House of the Imperial Parliament, a member. There were also in 1917 and 1918 meetings with Dominion Premiers styled Imperial War Cabinets; see *Parl. Papers*, Cd. 9005 (1918); Cmd. 325 (1919); Keith, *War Government of the British Dominions*, pp. 27—35.

(*n*) *Parl. Pap.*, Cd. 9230 (1918).

Cabinet resumed. There is clearly too great a dearth of political capacity to justify any effort at dispensing with collective counsel. Moreover, the type of mind capable of supervising the whole field of defence, or of social interests, or of commerce and industry, is not that which is successful in attaining a commanding position in the House of Commons; now would colleagues be ready to recognise the existence of superior minds. The disadvantages of the War Cabinet system were strikingly revealed by the utter failure to arrange a rational system of demobilisation in 1919, so that grave unrest developed in the army, and the elaborate scheme had hastily to be replanned by Mr. Churchill.

The War produced also a coalition under Mr. Asquith in 1915, reconstructed under a new Prime Minister in 1916, but the coalition fell in 1922, to be revived in 1931 under stress of economic pressure. But in November, 1933, the virtually Conservative character of the National Government was revealed on the passing into formal opposition of the Liberal members under Sir Herbert Samuel, in accordance with the wishes of the Liberal organisations in England and Scotland, and their constitution as a third independent political party.

*Work of Cabinet.*—Cabinet ministers are invariably privy councillors, and thus bound by the oath of secrecy; exception has been taken in Parliament to the inclusion of the name of a person as Cabinet Minister who was not a privy councillor (o). The Cabinet in fact originated as, and is still in a sense, but not in form, a committee of the Privy Council. It often itself works through committees, that on home affairs being, beside the Committee of Imperial Defence, the chief standing committee. It is concerned with the legal issues affecting draft measures, and with recommending the items of Government business for the session; in its work, which is solely advisory, it is aided by the Parliamentary Counsel to the Treasury and the Parliamentary Secretary respectively. The Cabinet's business covers all major issues of foreign policy, defence, finance, social issues, and constitutional questions, and especially does it dispose of all inter-departmental disagreements. Normally it does not consider appointments even of Governors-General, though that of India is an occasional exception, the exercise of the prerogative of mercy (an exception was the Bywaters case and that of Sir R. Casement in the War), or the personnel of the Cabinet itself.

[Meetings of the Cabinet are usually summoned by the Prime Minister, and may be held anywhere as the state of public affairs requires, without restriction as to time or place](p); in 1939 it met

(o) Viz., Lord Cawdor, when nominated to the office of First Lord of the Admiralty, in 1905. His attendance was excused by Lord Lansdowne on the ground that his presence was required (see 162 Hansard, 4 s. 864, 865). In 1907, Mr. McKenna was only invited to attend for departmental purposes: Anson, *The Crown* (ed. Keith), i, 123.

(p) In London, they are usually held at the Premier's residence in Downing Street, or at his private room at Westminster, or rarely at the Foreign Office (see Todd, *Parl. Govt.*, ii, 189). Except in cases of special urgency, meetings are not frequently held during the usual prorogation of Parliament between August and October.

on Wednesday regularly. On the eve of meeting Parliament several meetings are common, as in cases of crisis, as when on May 28, 1879, Lord Beaconsfield records six Cabinets in eight days. No official records of the transactions at Cabinet meetings were formerly kept, the decisions arrived at being conveyed either verbally or embodied in the form of written minutes to the Sovereign by the Prime Minister, who acts as the formal medium of communication between the Crown and its ministers. Misunderstandings were not rare, as in the case of the publication of the Spion Kop despatches in 1900, but errors need not be exaggerated, for the failure of clear results in 1876—78 regarding the Russo-Turkish conflict was probably not disliked by the Prime Minister. Occasionally formal minutes were adopted, as in 1871, when the Queen desired formal advice to abolish the purchase of army commissions (*q*), and in 1910, the King was requested by minute to promise to create peers (*r*). Under war conditions the practice of the recording of results achieved by the Secretary to the Cabinet was adopted and is continued, the office of Secretary and Clerk of the Council being combined until 1938 (*s*). In that year was constituted an office of Permanent Secretary and Secretary of the Cabinet, who is the head of a department, which includes the Clerk of the Privy Council and Deputy Secretary, and the Secretary of the Committee of Imperial Defence, and which provides for the Minister for the Co-ordination of Defence and the Economic Advisory Council.

*Cabinet Secrecy.*—Cabinet secrecy is now binding absolutely; previously there was much laxity. Lord Grenville communicated to the Speaker on his dismissal Cabinet minutes in 1807; William IV. sent in 1834 to Sir R. Peel an account of his discussions with Lord Melbourne, and permitted Lord John Russell to disclose discussions with the Cabinet on communications with Lord Durham (*t*). There was a very bitter discussion over certain revelations by Lord Derby on April 8, 1878, denounced by Lords Beaconsfield and Salisbury. There was a confused and unsatisfactory set of partial revelations of Cabinet secrets in 1931 on the reconstruction of the Government. The rule, however, is clear that the Prime Minister's permission and that of the King on his advice are necessary, and in 1932—33 the rule was applied on several occasions (*u*).

(*q*) Letters of Queen Victoria, 2nd Ser., ii, 152—154.

(*r*) Spender, *Lord Oxford and Asquith*, i, 296 f.

(*s*) *Parl. Pap.*, Cd. 9005, p. 3. There is, however, no record of Cabinet discussions, such as was made during the War; a summary of documents, of statements of fact, and of the main arguments, is followed by the conclusions in full: 155 H. C. Deb., 5 s. 265; 261 *ib.* 1163 f. The minutes are sent to the King in lieu of the Prime Minister's report, and to the members of the Cabinet. The Secretariat sends out the agenda under the Prime Minister's orders, care being taken, since 1919, that proposals involving finance shall not be circulated without the Chancellor of the Exchequer's approval. It circulates memoranda, records, conclusions, and sends extracts of conclusions to ministers not in the Cabinet. But its responsibility then ceases. The appointment to the Secretariat of a Treasury official secures due contact with that department.

(*t*) Melbourne Papers, pp. 248, 216. On the 1878 events, see Monypenny and Buckle, ii, 1143 ff.

(*u*) The taking away of Cabinet minutes was forbidden in 1934: the fining of Mr. Edgar Lansbury in respect of divulging a Cabinet memorandum submitted by his

**Collective Responsibility.**—The collective responsibility of the Cabinet has long been acknowledged, though it was still denied in the debate in 1806 on the question of the appointment of Lord Ellenborough as a member of the Cabinet, despite the fact that he was Lord Chief Justice (*x*); but there are, of course, limits to it. Each minister is individually responsible for the efficiency of his own department, and a minister's acts may be disavowed and his resignation called for, or felt to be necessary, as was that of Col. Seely in 1914 in the crisis on the army in Ulster (*y*). Thus, Mr. Montagu had in 1922 to resign because of his failure to recognise the solidarity of the Cabinet by publishing a telegram from the Government of India on his own responsibility (*z*). Or a minister may resign, accepting technical responsibility, and relieving the Government thereof, as did Sir A. Chamberlain in 1917 on the question of the Mesopotamian fiasco. Sir S. Hoare in December, 1935, resigned, the Cabinet having under pressure of public opinion reconsidered its acceptance of his proposals as to the dispute between Italy and Ethiopia. Subsequent action by the Government showed that it really shared the Foreign Secretary's views as to the necessity of violating the League Covenant in support of Italian ambitions (*a*). Or a minister may resign, as did Mr. Addison in 1921, because the Cabinet does not keep its obligation of support in a policy which he is carrying out on its account (*b*). Mr. Eden's resignation in February, 1938, and those of Mr. Duff Cooper and Lord Cranborne in October and February, 1938, were due to dissatisfaction with, and refusal to share responsibility for, the pro-Italian and pro-German policy of the ministry. In a few cases important issues have been left open; in 1831–34 the repeal of the corn laws, in 1873 the extension of the county franchise, in 1908–14 and 1917 women's suffrage, were thus treated. Freedom of voting on ecclesiastical measures and private bills is not rare, as on Prayer Book revision in 1928, and the Caledonian Power Bill in 1937. But the treatment of tariff reform as an open question in 1903 broke down.

The Coalition Government in 1931 was deliberately an exception to such collective acceptance of one policy: certain Liberal ministers joined with the right to differ on economic policy, which they duly exercised in 1932, but the position was anomalous and finally led

father, shows the necessity of the rule. Much very questionable use of those documents has been made in memoirs of late years: cf. 83 H. L. Deb. 5 s. 551 ff.; 238 H. C. 5 s. 2205 ff. The historic value of Lloyd George's War Memoirs, W. Churchill's World Crisis, and Duff Cooper's Haig has been held to justify disclosures.

(*x*) Cobbett, *Parl. Deb.*, vi, 308, 311.

(*y*) Spender, *Lord Oxford and Asquith*, ii, 46. The Irish rebellion of 1916 was followed by the voluntary resignation of Mr. A. Birrell: Keith, *The British Cabinet System, 1830–1938*, p. 248.

(*z*) 151 H. C. Deb. 5 s. 1490–1493. In 1873, Mr. Gladstone, without removing Mr. Lowe from office for implication in a financial irregularity affecting the post office, put him in a new office: May, *Const. Hist.* iii, 84 f.

(*a*) Keith, *Letters on Current Imperial and International Problems*, pp. 149, 150, 162 f.; 190 f.; *The King, the Constitution, the Empire, and Foreign Affairs, 1936–1937*, pp. 119 ff.

(*b*) 83 H. L. Deb. 5s. 551 f.; Snowden, *Autobiography*, ii, 1010–1012.

to their resignation on September 28 (c). Like difficulties had assailed the Coalition of 1916—22. The Prime Minister owes full sincerity to his colleagues; Mr. Balfour's action in concealing Mr. Chamberlain's resignation from his Free Trade colleagues on September 14, 1903, was criticised generally (d). The Commons have at times broken through the armour of collective responsibility and insisted on that of the individual, thus preventing a resignation of the whole Cabinet. But normally a vote of censure on any one department is regarded as a vote of censure on the whole Cabinet, and the Ministry either resigns or appeals to the country (e).

**The Crown and the Cabinet.**—Though originally the Sovereign presided at meetings of the Cabinet, and it is said that Queen Anne generally attended weekly (f), while, even under George III. and his sons, pardons were dealt with in Cabinet in the King's presence, the absence of the Sovereign from all meetings of ministers where deliberations or discussions take place, including committees of the Privy Council, has become clearly recognised as a constitutional necessity. The doctrine was clearly expressed by Lord Granville in Parliament in 1864 with reference to the attendance of the Queen at a committee of the Privy Council (g), and it has been invariably respected.

The Prime Minister thus presides in place of the Sovereign at meetings of the Cabinet, and his opinion is of paramount weight and importance; and, though members meet nominally on an equal footing, the vote of the majority in ordinary cases deciding the question (h), he has the power in the last resort of requiring the resignation of a minister, as in the case of Lord Thurlow in 1792 (i), Lord Palmerston in 1851 (k), and the Free Trade ministers in 1903 (l), or, by himself resigning, as did Mr. MacDonald in 1931 (m), of bringing about the dissolution of the Ministry as a whole. In form, of course, the

(c) 194 H. C. Deb. 5 s. 1489 ff.; Addison, *Politics from Within*, 1911—1918, vol. ii, ch. xiii—xviii.

(d) His own defence (Dugdale, i, 356 ff.) is characteristically disingenuous.

(e) See p. 163, *post*. The case of G. Wyndham's resignation (March 2, 1905) was very peculiar, and involved suspicion that he had been sacrificed because the Government found its policy unpopular; it also was anomalous because the ministry refused responsibility for Sir A. MacDonnell's Irish policy, but did not dismiss him: see Dugdale, pp. 415—423.

(f) See Campbell, *Lives of the Chancellors*, 4th ed., v, 249; Thompson, *Secretaries of State*, p. 110.

(g) See 175 Hansard, 3 s. 251.

(h) See Report of the Admiralty Committee, 1861, p. 168. The policy of the United States debts agreement in 1923 was carried against the Prime Minister in Cabinet; he made the error (as he admitted later) of not resigning, as did Mr. Gladstone in 1894 when defeated on his policy of dissolution to test feeling as to the position of the Lords: May, *Const. Hist.*, i, 125. Formal divisions may or may not be taken; cf. Oxford, *Fifty Years of Parliament*, ii, 192, 193, for the overruling of the Prime Minister on the issue of the recognition of the Southern States, and on war against Prussia in 1864.

(i) Stanhope, *Life of Pitt*, ii, 148—150, illustrates the procedure: the King was given the choice between Mr. Pitt and Lord Thurlow, and naturally sent Dundas to require the latter to surrender the Great Seal.

(k) Keith, *The King and the Imperial Crown*, p. 264.

(l) Holland, *Duke of Devonshire*, ii, 340.

(m) Keith, p. 134.

resignation of a minister needs royal approval, but normally the Crown has no choice between accepting the necessity of requiring the resignation or being faced with the difficult task of finding a new ministry. It rest with the Prime Minister to decide what issues shall go before the Cabinet (*n*), though refusal to submit at request is unusual and would evoke resentment, as when Lord Rosebery withheld the issue of Nicaragua despite Sir W. Harcourt's request (*o*). As presiding officer it is his duty to convey Cabinet decisions to the King, and no important policy in any sphere should be submitted to the Crown save after Cabinet discussion and through the Prime Minister. Individual ministers have the right of access to the Sovereign on matters concerning their own departments, though, if of any importance, such communications should be made known to the Premier immediately beforehand or afterwards (*p*). During Queen Victoria's long absence in Scotland the presence of a minister in attendance was regular. Mr. Disraeli went in 1868, and so resented the waste of labour that he went only once in 1874 during his second term of office.

**Right to Information.**—Though the Sovereign takes no part in the formal deliberations of his ministers, he is constitutionally entitled to criticise the conduct of the executive, and for this purpose the resolutions of the Cabinet ought to be communicated to him, together with the fullest information on all important matters, in time to enable him to come to a proper decision. But this does not mean that no policy may be adopted without royal approval, as Lord Salisbury suggested in respect of Queen Victoria's dispute with Lord Rosebery as to his claim to be entitled to state his policy as to the House of Lords without consulting the Queen. The right of the Crown is to early information (*q*). This was carefully observed in the anxious period of 1909—10 over the disputes between the two Houses of Parliament, as in the earlier disputes in 1884—85. It was constantly insisted on by Queen Victoria, though Mr. Balfour denied her right to be consulted before the despatch of important military orders, such as that to General Buller to relieve Ladysmith (*r*). Her ministers were expected to report fully in writing, while Edward VII. preferred oral discussions, and George V. enjoyed frequent contact with ministers. Edward VII. always expected information on all issues of magnitude and novelty (*s*). It is dubious if the precedent of personal contact has been followed carefully in the recent reigns. It is clear that Mr. Baldwin was not in close contact with the King prior to the abdication crisis, and Mr. Chamberlain, it was noted, when he visited the King on February 1, 1939, had not had an audience since before Christmas: in such anxious times action of this kind appears difficult to understand,

(*n*) See, *e.g.*, Dugdale, Arthur James Balfour, i, 339.

(*o*) Gardiner, Harcourt, ii, 331, 332. So, in 1903, Mr. Balfour refused a Budget Cabinet until Mr. Chamberlain's return from South Africa: Dugdale, i, 341.

(*p*) See Todd, Parl. Govt., ii, 208.

(*q*) Keith, The King and the Imperial Crown, pp. 157 ff.

(*r*) Dugdale, Arthur James Balfour, i, 296.

(*s*) May, Const. Hist., i, 108—110; iii, 360 ff.; Lee, King Edward VII., ii, 39 ff.

and Edward VII. would not have liked it. Measures sanctioned by the Sovereign should not afterwards be arbitrarily altered or modified without reference to him (*t*).

Since the Ministry is collectively responsible to Parliament for the advice given to the Crown, so that advice ought to be unanimous; and, as a necessary corollary, it is not, in general, constitutional for the Sovereign to inquire into the lines of division in the Cabinet. This doctrine is to be found enunciated in the House of Commons by Lord North in the reign of George III. (*u*), and stressed by Mr. Gladstone, though it is clear that other Prime Ministers, including Mr. Disraeli, Lord Rosebery, Lord Salisbury and Mr. Asquith have volunteered information freely. Similarly it is not desirable that the Crown should deal with ministers individually behind the back of the Prime Minister, a rule occasionally violated by Queen Victoria (*x*). A Prime Minister would, of course, be justified, on discovering the facts, in resignation if the offending Minister were not removed.

**Duty of Crown.**—The duty of the Crown to ministers is clear. It must not do anything inconsistent with the fundamental fact of ministerial responsibility. Thus it is not proper for the Crown to seek to fetter the advice of the Ministry by demanding pledges not to raise certain issues, whether as a condition of being given office or of retaining it; even in 1807, George III.'s dismissal of Grenville's Ministry for refusing a pledge on the Roman Catholic issue was severely criticised in Parliament (*y*). Moreover, except (1) in cases of grave importance, where it is necessary for the Sovereign to hear the views of all parties, or (2) where the Sovereign differs from his ministers and wishes to find others who would accept responsibility for his action by taking office in case of resignation of the existing Ministry, it is clearly recognised as unconstitutional for the Crown to take advice from persons other than its ministers. An illustration of the recognition of this principle is to be found in the frequent denunciations in Parliament of the "influence behind the throne" during the reign of George III. due to the party known as "King's men," or the "King's Friends," which that Sovereign attempted to form on the advice principally of Lord Bute (*z*), and John Dunning's famous declaration in his motion of April 8, 1780, that "the influence of

(*t*) See the Memorandum addressed to the Foreign Secretary (Lord Palmerston) by Queen Victoria through the Prime Minister (Lord John Russell) in 1851: 119 Hansard, 3 s. 90; see also 188 *ib.* 1133; Report on Official Salaries, 1850, Evidence No. 326.

(*u*) See Parl. Hist., xxiii, 678; xxiv, 291; Gladstone, Gleanings, i, 74, 242; Cabinet reply to George IV. in 1821; E. H. R., xxxviii, 221. For Lord Beaconsfield's disclosure of acute Cabinet divisions in 1877, see Buckle, ii, 1066 (seven views in twelve members). For Lord Salisbury's withholding facts as to his Irish negotiations from the Queen and Cabinet in 1885, see Lord Gladstone, *After Thirty Years*, p. 393.

(*x*) Cf. her communications to Lord Granville in 1859 and 1864 as to Palmerston's and Russell's policy; Fitzmaurice, *Life*, i, 350, 459; Keith, *The King and the Imperial Crown*, pp. 217—222. On the other hand, the Crown is clearly entitled to know the views of the Cabinet as a whole: Gardiner, *Harcourt*, ii, 611.

(*y*) Parl. Deb., ix, 285, 328—329, 335, 362, 380.

(*z*) See Parl. Deb., xvi, 9; May, *Const. Hist.*, i, 9, 10, 17, 36.

the Crown has increased, is increasing, and ought to be diminished" (a). William IV. was reminded by Lord Grey that he should not express his views in correspondence with the Duke of Wellington, nor make declarations on colonial policy save on ministerial advice (b). Queen Victoria too often violated this principle even to the extent of consulting Lord Beaconsfield, Mr. Goschen and Lord Salisbury when not in office (c). But the conferences of 1910 and 1914 over the relations of the Houses and Irish government were carried out constitutionally on ministerial advice, if in deference to royal anxiety, or even suggestion (d). The part played by the King in the crisis of August, 1931, was also on ministerial advice, when he discussed the issues with the leaders of the opposition parties before the Cabinet's decision to resign on August 23 (e). Mr. W. Churchill's visit to King Edward VIII. in December, 1936, was said to have been approved by Mr. Baldwin, but his expression of views (f) was regarded as open to objection. The Sovereign has, it is clear, a special qualification to act as mediator in the case of political issues (g). Under former conditions in Europe visits to other sovereigns were a source of some suspicions in Parliament, but it was never doubted that ministers must be fully informed of all the Sovereign did or said at interviews of this kind (h). Mr. Canning insisted on King George IV. allowing him to be present at any interview with a foreign minister (i). The Prince Consort, as well as Queen Victoria, was careful to disclose to the Prime Minister or the Foreign Secretary all private correspondence with foreign sovereigns touching on political

(a) Parl. Hist., xxi, 347. On June 24, 1822, Brougham showed that the Crown's authority was not diminished: May, Const. Hist., i, 91, 92. George IV., however, under overwhelming pressure, did accept Catholic emancipation.

(b) Corr. of William IV. and Lord Grey, i, 413—424. Peel in 1834 overruled the King when he attempted to pardon a criminal in Ireland through the Lord-Lieutenant: Parker, Sir Robert Peel, ii, 146—151. Cf. Keith, *The King and the Imperial Crown*, pp. 215 ff.

(c) Cf. Keith, pp. 217 ff. The attempt at an excuse in Monypenny and Buckle, ii, 1414 f., is worthless.

(d) Annual Register, 1910, p. 130; *The Times*, July 20, 1914. For Edward VII.'s interview with Lord Lansdowne and Mr. Balfour, October 12, 1909, see Oxford, *Fifty Years of Parliament*, ii, 73, 74.

(e) Snowden, *Autobiography*, ii, 947 ff.; Webb, *Political Quarterly*, iii, 1—17.

(f) Published in the Press, December 6 and 7, 1936; White, *Abdication of Edward VIII.*, pp. 55 ff.

(g) Todd, *Parl. Govt.*, ii, 202, 203, 205. Cf. Davidson, *Archbishop Tait*, vol. ii, ch. xix, giving the Queen's letters to Archbishop Tait as to the Lords' attitude to the disestablishment of the Irish Church; May, *Const. Hist.*, iii, 28—42, on the Queen's aid in securing the passing of the Franchise and Redistribution Measures of 1884—85; Lord Gladstone, *After Thirty Years*, pp. 360—365. An assertion that Buckingham Palace influence (i.e., of the royal entourage) would be exercised against a Labour Government's socialistic schemes was made by Sir S. Cripps, January 7, 1934, but was hotly criticised. In December, 1936, the Labour party leaders supported monarchy loyally, on the assumption of its essentially constitutional character.

(h) See the discussions in Parliament as to the visit of King Edward VII. to the Tsar of Russia. 239 Hansard, 4 s. 963—966, 1119, 1262, 1290, 1570, 1571. On such occasions the King is not necessarily accompanied by the Foreign Secretary or any member of the Cabinet (*ib.*). Cf. for visits to Hanover, Thompson, *Secretaries of State*, pp. 21, 22. On the disadvantages of absence of ministerial control on visits, cf. Keith, *The King and the Imperial Crown*, pp. 280, 289.

(i) Stapylton, *George Canning*, p. 433; Temperley, *E. H. R.*, xxxviii, 206—225. In 1825 he agreed to show him even his Hanoverian correspondence: Seton-Watson, *Britain in Europe*, p. 97.

issues (*k*). Edward VII. worked indefatigably but only in accordance with ministers' wishes for an Anglo-Russian entente and closer relations with France (*l*).

**Necessity of Ministerial Advice.**—It is now absolutely clear that for any executive or legislative action of the Crown some minister or the Cabinet must be responsible. This doctrine does not, of course, mean that the King does not in fact take decisions of his own in cases where conflicting courses are open, *i.e.*, in the vital case of the termination and formation of ministries. Queen Victoria need not have selected Lord Rosebery; George V. might have chosen Lord Curzon, nor have secured a National government in 1931. Edward VIII. might have appealed to Mr. Churchill to form a ministry with the Press support of Lords Beaverbrook and Rothermere, and Lady Houston. But any act must be defended in the Commons, by a minister who accepts responsibility (*m*).

The doctrine of ministerial responsibility was often asserted (*n*) even in the eighteenth century, but it was found difficult to adjust it at first to cases where the King refused to act as advised by his existing ministry, for example, in the case of Mr. Fox and Lord North in 1783, or of Mr. Pitt in 1801, because he knew he could find others to support a different policy. The question was (*o*) debated hotly in 1807 when Mr. Perceval for the Portland Ministry still argued, as did Mr. Canning, that the new Ministry could not be responsible for the King's dismissal of the Grenville Ministry, but in 1834—35 Peel fully adopted it (*p*). It was urged in 1913 by Lord Halsbury (*q*) and others that the King under the wording of the Parliament Act, 1911, had the right to refuse assent to the Government of Ireland Bill, on the assumption that his action would be supported by the opposition. But it must be remembered that the Reform Act of 1832 made a vital change, for the Prime Minister then became the representative of the popular will, and that there is grave reason to deprecate a situation in which the Crown should be attacked by a discarded Ministry as having defied the popular will. It is very dubious if the success of George III. in

(*k*) Martin, *Life of Prince Consort*, iv, 433. His advice in securing modification of the dispatch to United States in 1861 with regard to the Trent case is recorded, *ib.* v, 422.

(*l*) Lee, *King Edward VII.*, ii, 125, 166, 221, 260, 292. Cf. Oxford, *Fifty Years of Parliament*, ii, 87, 88. Balfour insisted that he was not the author of the entente: Newton, *Lord Lansdowne*, p. 293. So Esher, *The Influence of King Edward* (1915), p. 50; Grey, *Twenty-Five Years*, i, 204. But see Seton-Watson, *Britain in Europe*, pp. 620 f., for a more just estimate.

(*m*) See p. 158, *ante*.

(*n*) *E.g.*, in 1711 (see *Parl. Hist.*, vi, 972, 1083); 1739, by the Duke of Argyle (*Parl. Hist.*, x, 1138); 1741, by Sir John Barnard (*Parl. Hist.*, xi, 1268); 1807, by Lord Selkirk (*Parl. Deb.*, ix, 335, 381). But contrast Fox's declaration on December 4, 1778 (*Todd, Parl. Govt.*, i, 175; *Fox, Mem.*, i, 203) that the King was "his own unadvised minister." Hardwicke twice refused to affix the great seal to treaties at George II.'s request (*Harris, Life*, ii, 59, 369), clearly on the ground that such action was illegal. Contrast p. 144, *ante*.

(*o*) See *Parl. Deb.*, ix, 335, 381.

(*p*) 26 *Hansard*, 3 s. 216, 223.

(*q*) November 5, 1913 (*The Times*, November 6, 1913). Cf. Bonar Law, January 24, 1913 (*The Times*, January 25, 1913); Esher, *Journals*, iii, 117—121, shows the King's position.

dismissing Mr. Fox and Lord North in 1783, and the electoral success of Mr. Pitt in 1784, could ever be repeated, so changed are the conditions (*r*). It would be impossible now for a minister to follow Mr. Pitt's action in 1801, in resigning on account of his inability to concur in George III.'s views on the Roman Catholic question (*s*). Even before the Reform Act the will of the people prevented the Duke of Wellington and Lord Lyndhurst being able to find a Ministry on Lord Grey's resignation, when William IV. refused to create peers to carry the bill (*t*).

The powers of the Crown are no doubt important. The prestige derived from heredity, from titular headship of the navy, army and air force, from the leadership of society, from the importance of the Kingship as the symbol of connection between the United Kingdom and the Dominions (*u*), and from experience and ability may easily give the King such weight with ministers as to secure acquiescence in matters not vital. Queen Victoria (*x*) laboured greatly and advised freely from first to last; all her views were listened to carefully, and now and then doubtless had weight, as in 1864 on the attitude of the United Kingdom to the Prussian attack on Denmark. But Lord Palmerston, Sir R. Peel, Mr. Disraeli, Mr. Gladstone yielded only minor points, and during the Liberal Ministry of 1906—10 King Edward VII. was on decidedly strained terms with certain of the ministers (*y*). It is disputed how far George V. was instrumental in persuading ministers to achieve the Irish settlement (*z*).

**Power to refuse Advice of Ministers as to Dissolution or otherwise, and to Dismiss.**—The right of the Crown to refuse advice is sometimes asserted to exist in the case of requests for dissolution of Parliament, and Queen Victoria seems to have held the view that the Crown could refuse. But the weight of authority as voiced, even in 1858 (*a*), by Lord Aberdeen is wholly against the power to refuse one dissolution to a Ministry. When Mr. Asquith, on the creation of the Labour Government in 1924, contemplated the possibility of a refusal in view of the existence of three parties, in point of fact the King gave a dissolution to Mr. MacDonald without even trying the possibility of an alternative government. On the other hand, it seems clear that in certain circumstances the King might have to

(*r*) Tuberville, House of Lords in 18th Cent., pp. 408—415.

(*s*) May, Const. Hist., i, 64—67. The King's action was indefensible, when contrasted with his ready assent to the Quebec Act, 1774, and its effect on Irish history is comparable with his share in the loss of the American colonies.

(*t*) Earl Grey, The Reform Act, 1832, ii, 395, 406.

(*u*) Recognised as of growing value by Balfour in 1901: Dugdale, i, 317; Keith, The British Cabinet System, 1830—1938, pp. 455 ff.

(*x*) In addition to her letters, see Monypenny and Buckle, Life of Disraeli, ii, 226 ff., 239 ff. (Reform Bill, 1867); ii, 446 ff. (Irish Church disestablishment, 1869); ii, 1323 ff.: Morley, Gladstone, bk. vi, ch. i. Her unfairness to Gladstone after 1876 is clearly proved by Lord Gladstone, After Thirty Years, pp. 317—383. Disraeli, it must be remembered, failed gravely in appreciation of the greatness of his rival: Monypenny and Buckle, ii, 1516.

(*y*) Keith, The King and the Imperial Crown, p. 240.

(*z*) Cf. *The Times*, July 30, 1921; F. Pakenham, Peace by Ordeal, p. 77.

(*a*) Letters of Queen Victoria, iii, 364. For Mr. Asquith's views, see *The Times*, December 19, 1923. See Keith, The King and the Imperial Crown, ch. vii.

refuse advice, for instance, in the case of the demand for a second dissolution after defeat on an earlier dissolution immediately preceding without any vital change of conditions, or if a revolutionary measure were passed under the Parliament Act, 1911, without a popular mandate. The sole criterion must be the will of the electorate; if it has not been consulted, reference to it might become a royal obligation. If, for instance, a Labour Government were to demand the swamping of the House of Lords, in lieu of procedure under the Parliament Act, 1911, the King could hardly agree unless the issue of swamping had been put clearly before the electors and had been supported by a large majority, representing a real majority of the electors. Similarly, if a Ministry refused to obey an adverse vote of the Commons, and to resign or appeal to the country, the King might be compelled to dismiss it. Nor could he assent properly, against the clear will of the electorate, to an extension of the life of Parliament or an unfair franchise or redistribution bill. The right of the people to petition for a dissolution was admitted in 1701, 1710, 1769 and 1784, and might be exercised on occasion arising (b). But it must be remembered that the abdication of Edward VIII. in circumstances involving his conduct in the severe censure of the Archbishop of Canterbury, has gravely weakened the position of the Crown, and may prove to have reduced the Crown to mere ornamental and symbolic functions (c). Further, the acceptance by George VI. of the new form of the Coronation oath, despite its patent illegality, must be regarded as the admission of the doctrine that in legal issues the King must accept the advice—however unsound—of his ministers. The Labour party may thus claim a binding precedent for royal approval of any measure certified by its leader as Prime Minister to be legal. The possibility of the Crown continuing to serve as a safeguard to the Constitution must, therefore, now be reckoned doubtful.

**Ministerial Responsibility.**—The ministers of the Crown may be made responsible for the conduct of the executive or for administrative or legislative acts in two ways: (1) Firstly, they are individually and personally liable for tortious or criminal acts, and in such cases are in general amenable to the ordinary legal processes in the manner and subject to the exceptions previously mentioned (d).

(2) Secondly, they are immediately responsible to Parliament, and ultimately to the electorate, for the general conduct of the executive and the advice given to the Crown, as also for the policy of the legislative measures initiated under Government auspices. This

(b) The Commons resolved that the right to petition covered a petition for calling, sitting or dissolving of Parliament (February 22, 1702): 13 Com. Journ. 767.

(c) On the abdication, see p. 123, *ante*; the Archbishop's broadcast was given on December 13, 1936, and its justice was not seriously questioned; C. Mackenzie's attack (*The Windsor Tapestry*, pp. 542—551) is based on a failure to understand the feelings of Protestant laymen on the prospect of the marriage of the King to a woman who had twice obtained divorces. For the illegality of the oath, see p. 126, *ante*.

(d) Cf. Lord Hardwicke's insistence on legality (p. 160, *ante*). Contrast Earl of Bath's obedience, on score of doubt, to illegal orders to punish under the Mutiny Act half-pay officers at Preston: *Parl. Hist.*, xiv, 479.

responsibility may be enforced in the case of Parliament, either in theory by impeachment, or in practice by direct vote of censure or want of confidence, or by the defeat of a vital Government measure in the House of Commons, either of which latter events is generally understood necessarily to entail the resignation of the Ministry and consequent loss of office, unless, on an appeal to the electorate at a general election consequent upon a dissolution, they are again returned to power with a majority sufficient to enable them to carry the measure in question. It is in this sense that they are said to be ultimately responsible to the electorate. A dissolution thus has come to have a very different sense from that which was held by Queen Victoria in the earlier part of her reign, when she regarded it as an appeal by the Crown to the country to reinforce the Ministry (*e*). It denotes an appeal from the verdict of the Commons to the political sovereign, the electorate, and in no wise concerns the Crown. This change of aspect explains the fact that it is not now usual for the Commons to address the Crown against a proposed dissolution, as was done in 1784, for this suggests reluctance to face the electorate, though it would be constitutional so to act if it were proposed to dissolve a freshly elected House.

**Dissolution of the Ministry.**—The dissolution of the Ministry normally takes place in one of two ways, either by resignation of the Prime Minister or his death. The demise of the Crown does not affect the existence of the Ministry, since by the Demise of the Crown Act, 1901, the holding of any office under the Crown is not affected by the demise of the Crown (*f*); nor does the dissolution of Parliament itself terminate the existence of the Ministry. The death or resignation of the Premier does not, of course, as a matter of law, deprive his colleagues of office. Under George IV. in 1827, neither Lord Liverpool's illness in February nor Canning's death on August 8, was deemed to dissolve the Government. But in effect it is equivalent to a dissolution of the Ministry, since in such cases the various offices are now invariably placed at the disposal of the new Premier (*g*). Thus, in 1931, the Prime Minister tendered his resignation, thus dissolving the Labour Government, and enabling him to form a National Ministry. This latter act he did against the emphatic wishes of the great majority of his Cabinet, which did not accept his view of the urgency of the position or of the danger of departing from the gold standard—a step in fact which he later adopted as desirable (*h*). In

(*e*) Cf. her remarks in 1841 to Lord Melbourne and in 1846 to Lord John Russell (Letters, i, 348; ii, 107, 108) with her attitude in 1874 to Mr. Gladstone (Morley, ii, 485). Cf. May, *Const. Hist.*, iii. 87 ff.; Keith, *The British Cabinet System, 1830–1938*, pp. 391 ff.

(*f*) See p. 126, *ante*.

(*g*) See Aspinall, *E. H. R.*, xlii, 533–559, who points out that the King did not then admit the sole right of the Premier to select his colleagues; in this as in other points George IV. marks the end of a tradition.

(*h*) Cf. Keith, *The King and the Imperial Crown*, pp. 130 ff. Lord Parmoor (*Retrospect*, pp. 306–320) gives a convincing demonstration of the unconstitutionality of Mr. MacDonald's action in arranging his continued tenure of the Prime Ministership behind the back of, and at the expense of, his colleagues. Mr. N. Chamberlain properly held that the leader of the opposition should have been given the task. See

1935, Mr. MacDonald's resignation did not actually vacate the offices of his colleagues, and those who were retained in their posts were deemed to have held office continuously (*i*).

Transfer of office from one ministry to another is carried out formally at two meetings of the Privy Council held on the same day. At the former the Lord Chancellor, Lord Privy Seal, and Secretaries of State hand back their seals to the King; at the second, the seals are transferred to their new recipients, and the King in Council declares the Lord President. New letters patent revoke the former patents for the Treasury and Admiralty.

The resignation of the Ministry usually follows upon (1) the defeat of a Government measure, or (2) the passing of a vote of censure or want of confidence in the House of Commons, or (3) a defeat at the polls in the case of a general election. From 1841 to 1931 the dissolution of the Ministry was invariably due to one or other of these causes, except in the cases of the re-organisation of the Ministry in 1865, consequent upon the death of the Premier, Lord Palmerston; those occasioned by Asquith's loss of support in 1915 and 1916, and by internal dissensions in Lloyd George's Cabinet of 1922; and the changes of 1868, 1894, 1908, and 1923 necessitated by the retirement from ill-health of Lord Derby, Mr. Gladstone, Sir H. Campbell-Bannerman, and Mr. Bonar Law, while Lord Salisbury's resignation in 1902 was mainly induced by advancing years (*k*). In 1905, Mr. Balfour's resignation was due to lack of a programme, and was unquestionably too long delayed in view of the adverse by-elections in 1904 and 1905, which showed that the country was turning against the Commons as elected in 1900 under war conditions (*l*). Resignation of a Ministry consequent upon finding itself in a minority in the House of Commons needs little or no comment, the instances in later Cabinet history being numerous. The principle was first illustrated by the resignation of Walpole in 1742, though he was not accompanied by all his colleagues (*m*). In 1782 the whole Ministry, except Lord Thurlow (Lord Chancellor), retired with Lord North, consequent upon the narrow defeat, by nine votes, of a vote of no confidence (*n*), following on a majority of only ten against a motion accusing the ministry of incompetence (*o*). Since that date, except in a few early instances where individual ministers (as Lord Thurlow and Lord Palmerston in 1809—28 and 1830—34) have retained their offices in successive

also Webb, *Political Quarterly*, iii (1932), 8 ff. The view that the King was the motive power in securing the creation of the National ministry (Laski, *Parl. Govt.*, pp. 233 ff) is unproved.

(*i*) See 304 H. C. Deb., 5 s. 337—358. So in May, 1937, on Mr. Chamberlain's succession.

(*k*) Dugdale, *Arthur James Balfour*, i, 318. It may be noted that he disliked Mr. Balfour's education policy (*ib.* i, 323).

(*l*) He had refused in 1904 to resign or dissolve, despite a defeat in the Commons two days after an appeal to his followers for steadier support: May, *Const. Hist.*, iii, 136; Oxford, *Fifty Years of Parliament*, ii, 1—5; Dugdale, *ch. xix*.

(*m*) See Mahon, *Hist. of Eng.*, iii, 101, 112.

(*n*) *Parl. Hist.* xxii, 1170.

(*o*) See *Parl. Hist.*, xxii, 1114—1115 (226 to 216). He had refused to retire merely on a vote reversing the war policy of the administration (March 4, 1782).

administrations, the resignation of the Premier has entailed the retirement of the Ministry collectively.

But, as the result of the change of relations since 1867 between the electorate and the Commons, the rule of resignation is no longer confined to cases of votes of no confidence. It is now the convention that a vote on any issue of importance is fatal to the continuation of the Ministry in power, unless it can successfully appeal to the electorate. The Ministry, of course, decides what is a vital vote, and it may ignore minor defeats, as did Mr. Balfour in 1904—05, but these weaken its prestige, and go far to explain his complete defeat in 1906. Mr. MacDonald in 1924 was head of a minority government and had definitely announced that he would resign only on a direct vote of no confidence and not on a snap division on a minor issue. In fact, however, he dissolved on defeat on a comparatively minor issue, that of investigation into an alleged case of political interference with proceedings for incitement to mutiny (*p*); but his Government was in difficulties on policy in general, and he had so mismanaged relations with Russia that a defeat on his treaty therewith was certain.

If a Ministry appeals to the electors either for a renewal of confidence on the approaching termination of the mandate of the Commons or for support against the Commons, and is defeated, then it may either resign before meeting Parliament or wait for a vote of no confidence. The decision normally depends on the nature of the hostile majority, whether a temporary coalition of dissident elements or a united opposition.

The principle of resignation without meeting Parliament after an adverse verdict at a general election was illustrated in 1868 by the retirement of the third Derby and first Disraeli administration. Since that date the practice after a general election has varied, five Ministries (*viz.*, the first Gladstone Ministry in 1874, the second Disraeli Ministry in 1880, the third Gladstone Ministry in 1886 (*q*), the first MacDonald Ministry in 1924, and the Baldwin Ministry in 1929) having resigned immediately without meeting Parliament, whilst three (*viz.*, the first and second Salisbury Ministries in 1886 and 1892 and the Baldwin Ministry in 1924) awaited a vote of want of confidence in the new House of Commons (*r*).

**Advisory Committees to aid the Cabinet.**—For defence and economic and financial issues the Cabinet has the assistance of two important bodies, the Committee of Imperial Defence, which will be described later (*s*), and which, under present conditions is supplemented by a

(*p*) 177 H. C. Deb. 5 s. 581—704.

(*q*) See Political History of England, xii, 259, 300, 387.

(*r*) *Ib.* xii, 375, 476; May, Const. Hist., iii, 116, 124. In 1873 an interesting issue arose as to Disraeli's duty to take office on defeating the Government on the Irish University Bill. He refused on tactical grounds so to act. His action is defended by May, Const. Hist., ii, 82, 83; Monypenny and Buckle, ii, 544 ff. Cf. Keith, The King and the Imperial Crown, pp. 140, 151, 152, 160; The British Cabinet System, 1830—1938, pp. 45 f., 306 f.

(*s*) See p. 181, *post*.

Defence Policy and Requirements Committee, and the Economic Advisory Council, which is a development from the Committee of Civil Research of 1925 (*t*). This body includes as a nucleus the Prime Minister, the Chancellor of the Exchequer, the Secretary of State for Dominion Affairs, the President of the Board of Trade, and Minister of Agriculture and Fisheries. Other ministers can be summoned, and there are nominated by the Prime Minister experts in economics and industries such as bank directors, company directors, experts of university status, representatives of trade unions and co-operative societies, and scientific advisers. It works by full meetings, which are rare, standing committees for economic information and scientific research, and sub-committees, and can advise on all matters referred to it (*u*) affecting trade and industry, national and international. But its activities are necessarily limited by the general policy of the Government, and are purely advisory. It is probably not well constituted for its purpose.

*Political and Non-Political Departments.*

The executive business of the country falls into two classes; in one case which covers the administration of the defence forces, foreign and imperial affairs, and certain aspects of home affairs, the Crown acts through ministers, using prerogative and statutory powers; in the other case covering collection and management of taxes, granting patents, registration of births, &c., it is unnecessary that ministers should be employed, as the matters can be regulated in the main by statute and statutory orders. Hence we have the distinction of political and non-political departments according as the head is a minister or a permanent civil servant. The non-political departments, of course, fall under political control, save in so far as it is now a practice to seek to erect bodies of commissioners who are not under direct political control such as the British Broadcasting Corporation, the numerous Agricultural Marketing Boards, the Wheat Commission, the Central Electricity Board, &c.

(*t*) Treasury Minute, May 28, 1925; Parl. Paper, Cmd. 2440.

(*u*) Treasury Minute, January, 1930; Parl. Paper, Cmd. 3478; 245 H. C. Deb. 5 s. 850; 308 *ib.* 1954; Laski, Parl. Govt., pp. 266 ff., where there is an effective criticism of the theory of an Economic General Staff.

## CHAPTER III.

## THE MEMBERS OF THE EXECUTIVE.

*The Lord Chancellor.*

THE Lord High Chancellor is appointed by the Crown on the advice of the Prime Minister by delivery of the Great Seal, of which he is the keeper, and his office is not determined by the demise of the Crown. He is chosen from amongst the adherents of the party in power, is invariably a member of the Cabinet, and resigns with the Ministry on a change of Government. The appointment of a Roman Catholic or a Jew would certainly be deemed unconstitutional, and the former is probably illegal under the provisions of the Roman Catholic Relief Act, 1829 (*a*). Otherwise no definite legal qualifications are required; the post is, however, invariably offered to some distinguished member of the Bar or the Bench who, in most cases, has served as a law officer, exceptions being Lord Haldane (1912—15, 1924), Lord Sankey (1929—35), and Lord Maugham (1938—39).

He is the principal legal dignitary and President of the High Court of Justice (*b*). He is also President of the Court of Appeal, and of the Chancery Division of the High Court of Justice (*c*). In precedence (if, as is usually the case, of the degree of baron of Parliament or above) he ranks next after the Archbishop of Canterbury (*d*).

The Lord Chancellor is *ex officio* Speaker of the House of Lords, and presides at judicial proceedings on appeal. He is also an *ex officio* member of the Court of Appeal, and ex-lord chancellors are also *ex officio* judges of that Court, but they are not obliged to sit and act, except with their consent, upon the request of the Lord Chancellor (*e*).

He is the custodian of the Great Seal, which is kept in the office of the Clerk of the Crown in Chancery; it is requisite for instruments to sign and to ratify treaties, to create peers or appoint judges, to grant charters, &c.

He enjoys a salary of £10,000 (£4,000 as Speaker) per annum, and a retiring pension of £5,000. He is conservator and justice of the peace throughout England, and all puisne judges of the High Court are selected by him; the Lord Chief Justice, the President of the Probate, Divorce and Admiralty Division and the Master of the Rolls

(*a*) The Roman Catholic Relief Act, 1926 (16 & 17 Geo. V. c. 55), is silent.

(*b*) Judicature Act, 1925, s. 2.

(*c*) *Ib.* s. 4.

(*d*) Stat. (1539) 31 Hen. VIII. c. 10, s. 4. See *ib.* s. 8, if below the degree of baron.

(*e*) Judicature Act, 1925, s. 8.

are nominated by the Prime Minister. He appoints County Court judges (except within the Duchy of Lancaster, where they are still appointed by the chancellor of the duchy), arranges their districts, and may remove them or coroners for inability or misbehaviour (*f*). He is in control of the Land Registry and the Public Trustee Office. He is also the patron of all Crown livings not over £20 per annum according to the valuation taken in the reign of Henry VIII., and, on the recommendation of the lord lieutenants, or as regards boroughs the Home Secretary, advises the Crown as to the appointment of justices of the peace, and as to their removal.

### *The Lord Privy Seal.*

The duties of this office were abolished by statute in 1884. The office itself, however, still remains (though practically involving no duties) and is filled by a member of the Cabinet, thus enabling him to devote his energy to other work, as in 1924—29 the leadership of the Lords, in 1929—31 the co-ordination of unemployment relief schemes, and in 1938—39 defence against air attack. Formerly it was necessary for many instruments, and specially letters patent, to pass under the Privy Seal before they could pass under the Great Seal. Now, by the Great Seal Act, 1884, a warrant under the sign manual, countersigned by the Lord Chancellor, or a Secretary of State, or the Lord High Treasurer, or two Treasury commissioners, is sufficient authority for passing any instrument under the Great Seal, and for the future no instrument need be passed under the Privy Seal (*g*). The office generally carries with it a seat in the Cabinet.

### *The Law Officers of the Crown.*

These are the attorney- and solicitor-general for England, as also an attorney-general for Northern Ireland (*h*), and the lord advocate and solicitor-general for Scotland. They are appointed by letters patent, and hold office *durante bene placito*. Their present salaries are £4,500 and £4,000 and fees, without private practice (*i*), but with claims for judicial preferment.

The attorney-general in England and the lord advocate in Scotland are leaders of the Bar in their respective countries, and their duties are to represent the Crown in legal proceedings, to conduct Crown prosecutions, and to act as the legal advisers of the various departments. The attorney-general may stay proceedings in any criminal prosecution (or, it seems, in civil proceedings (*k*)) by *nolle prosequi* at his discretion, without calling upon the prosecutor to show cause (*l*), and has the

(*f*) County Courts Act, 1888, ss. 8, 15, now 1934 (24 & 25 Geo. V. c. 53), ss. 4, 7; Coroners (Amendment) Act, 1926, s. 2 (5).

(*g*) 47 & 48 Vict. c. 30, s. 3.

(*h*) For this official, see Office of Attorney-General Act, 1923 (13 & 14 Geo. V. c. 18 (N. I.)).

(*i*) 257 H. C. Deb. 5, s. 524. In Scotland £5,000 and £2,000, no fees.

(*k*) See *R. v. Evans* (1819), 6 Price, 480.

(*l*) See *R. v. Allen* (1862), 1 B. & S. 850. It can be entered after verdict: *R. v. Leatham* (1861), 7 Jur. (n. s.) 674.

right to reply in all criminal cases, whether evidence has been called for the defence or not. He may also demand a trial at bar as of right where the Crown is interested (*m*). The attorney-general is a necessary party to the assertion of public rights even when the moving party is a private individual (*n*), as opposed to a public body entrusted by statute with matters relating to the public welfare (*o*). The law officers, both in England and Scotland (with less regularity in the latter case) are usually members of the House of Commons, and share, in a sense, in the general responsibility to Parliament of the administration as a whole for advice given to the Crown. The attorney-general has occasionally of late been a member of the Cabinet, though there are some objections to this practice (*p*).

The control of the Director of Public Prosecutions lies with him, and the question of the right of the Cabinet to interfere in such issues was discussed in respect of the Campbell case in 1924, when after consideration in Cabinet the Attorney-General gave instructions for the withdrawal of the prosecution. It is clear that where high political interests are involved, the Cabinet may intervene, as responsible for the welfare of the realm, though the action in the case in question was ill-advised as may be seen from the resignation of the ministry rather than face an investigation by a select committee (*q*).

The duties of the solicitor-general are similar but in subordination to those of the attorney-general. When the office of attorney-general is vacant, the full duties of his office devolve upon the solicitor-general (*r*). So the Public Order Act, 1936 (*s*) assigns in a vacancy or illness or absence the powers of the attorney-general under that Act to the solicitor-general.

In certain legal proceedings, *e.g.*, petition for revocation of a patent and proceedings under the Coinage Offences Act, 1936, the Prevention of Corruption Act, 1906, the Incitement to Disaffection Act, 1934, the Public Order Act, 1936, the Explosive Substances Act, 1883, the Foreign Marriage Act, 1892, the Official Secrets Acts, 1911 and 1920, and other Acts, the fiat of the attorney-general is necessary (*t*). In certain cases an action can be brought against him for a declaration of right (*u*), and he can certify that an appeal should be allowed to the House of Lords from a criminal decision in the Court of Criminal Appeal (*x*). He can bring proceedings to secure an injunction against

(*m*) See Crown Office Rules, 1906, r. 151; *Bellomont's Case* (1700), 2 Salk. 625; *Dixon v. Farrer* (1886), 18 Q. B. D. 43. As to trial at bar on indictment, the High Court has full discretion: 1 & 2 Geo. VI. c. 53, s. 11.

(*n*) *Att.-Gen. v. Ashborne Recreation Ground*, [1903] 1 Ch. 101; *London County Council v. Att.-Gen.*, [1902] A. C. 165.

(*o*) *London County Council v. South Metropolitan Gas Co.*, [1904] 1 Ch. 76.

(*p*) Sir D. Hogg was in the Cabinet, 1924—29; Sir R. Isaacs was admitted in 1912.

(*q*) 177 H. C. Deb. 5 s. 581 ff.

(*r*) *R. v. Wilkes* (1770), 4 Burr. 2527, 2554, 2570.

(*s*) 1 Edw. VIII. & 1 Geo. VI. c. 6, s. 9 (2).

(*t*) His function of dealing with patent appeals has been transferred as judicial to a judge (22 & 23 Geo. V. c. 32; S. R. & O., 1932, No. 887).

(*u*) *Dyson v. Att.-Gen.*, [1911] 1 K. B. 410.

(*x*) Criminal Appeal Act, 1907 (7 Edw. VII. c. 23). He has very seldom done so: *Woolmington v. Director of Public Prosecutions*, [1935] A. C. 462; *Andrews v. Director of Public Prosecutions*, [1937] A. C. 576.

the misuse of trade union funds under the Trade Disputes and Trade Unions Act, 1927. He can direct instruction of counsel by the King's proctor in divorce proceedings or proceedings to establish death.

There is also an attorney-general of the Duchy of Lancaster, who represents the Crown in the Duchy Court, and an attorney-general and solicitor-general of the County Palatine of Durham, who exercise like functions in the Chancery Court of Durham.

#### *The Chancellor of the Duchy of Lancaster.*

This officer is a member of the Ministry and appointed by letters patent. He controls the Courts of the duchy, which since the Judicature Act, 1873, consist only of the Chancery Court, and appoints and dismisses County Court judges within the duchy. He is also responsible for the management of the Crown lands within the duchy. His duties, however, in all these matters are discharged by subordinates, and the office is practically a sinecure. The salary is paid out of the funds of the duchy (£2,000) which are reserved to the Crown, so that his position as regards responsibility is indirect. If a Cabinet minister, his salary is increased to £5,000 (*y*).

#### *Legal Officers.*

These include H.M. Procurator-General and Treasury Solicitor, charged with many duties as to administration of estates, petitions of right, &c., who also is appointed King's Proctor to act in Admiralty in proceedings for droits of the Admiralty and in matrimonial causes to intervene under the Attorney-General's direction in divorce causes and to aid the Court on its direction in nullity and divorce causes and in petitions to presume death (*z*). The Home Secretary appoints a Director of Public Prosecutions, who, subject to the Attorney-General, controls the initiation of prosecutions at public cost (*a*). The office was separated on June 19, 1908, from that of Treasury Solicitor. Rules for his guidance may be made by the Home Secretary and Lord Chancellor in consultation. The Statute Law Committee is responsible for the annual volumes of Statutory Rules and Orders.

#### *The Secretariat.*

The office of King's Secretary dates from the thirteenth century, and it became customary from 1433 to appoint two secretaries, who were at first minor officers of the household, acting as the means of communication between the Crown in its relations with the Privy Council and its various committees, and with foreign representatives and subjects. At first the privy seal was in their care, but this ceased in the fourteenth century with the emergence of the office of

(*y*) Ministers of the Crown Act, 1937, s. 3. The Duchy and County Palatine are not identical in area, but this is of no constitutional interest.

(*z*) Supreme Court of Judicature (Consolidation) Act, 1925, ss. 181—183; 1 Edw. VIII. & 1 Geo. VI. c. 57, s. 8 (3).

(*a*) Prosecution of Offences Act, 1908 (8 Edw. VII. c. 3). See also 42 & 43 Vict. c. 22; 47 & 48 Vict. c. 58. See also p. 169, *ante*.

Lord Privy Seal. In 1443 the signet appears in their custody and it was used as an authority for the issue of letters of privy seal which led to a grant under the Great Seal. Under Henry VIII. in 1539 they appear as enjoying a high precedence and in attendance, one on the Lords, one on the Commons. Under Elizabeth they cease to be of the household, and Sir W. Cecil held the office up to 1571 (*b*). She had as a rule one Secretary only, but from the later part of her reign there were usually two, three in 1616, from 1707 to 1746 a third for Scots affairs, and from 1768 to 1782 one for Colonial (American) business. The importance of the office grew with the establishment of the Cabinet, and under George I. and II. the Secretary appears as exercising independently powers formerly wielded by Council Committees.

Down to 1782 there were two secretaries for foreign affairs, one for the northern states of Europe and one for the southern, including also colonial, Irish and Scots affairs. In 1782 (*c*), the northern department took over the entire management of foreign affairs, whilst the southern looked after home, war, Scots, Irish, and colonial affairs. In 1794 a Secretary of State for War was added, and the management of the colonies was transferred to him in 1801. In 1854 a Secretary of State for War was appointed, in whom were combined the offices of the former Secretary at War and of the Secretary of State for War, whilst colonial affairs were entrusted to a separate Secretary of State for the Colonies. In 1858 a fifth Secretary for India was appointed. In 1917 a sixth Secretary of State for Air was appointed. In 1925 a Secretary of State for the Dominions was appointed, but the office was conjoined to that of the Secretary of State for the Colonies until 1929, and in 1926 a Secretary of State for Scotland was appointed, power being given to increase the number of secretaries and under-secretaries (*d*) sitting and voting in the Commons (*e*). The constitutional separation of Burma from India, added a Secretary of State for Burma from April 1, 1937.

The Secretaries of State are now invariably members of the Cabinet; they advise the Crown in the conduct of their departments, and exercise prerogative and certain statutory powers. In the absence of any statutory provision to the contrary, any principal Secretary of State may perform the duties of any other principal secretary (*f*). It was decided in *Leach v. Money* (*g*) and other cases that a Secretary of State cannot issue a general warrant for the arrest of any person or of papers. He may, however, issue a warrant for arrest for treason

(*b*) Tanner, Tudor Const. Doc., pp. 202—212.

(*c*) Anson, The Crown (ed. Keith), i, 179.

(*d*) For an Indemnity Act, see 20 Geo. V. c. 9. The arrangement is now superseded by the Ministers of the Crown Act, 1937, s. 9. See p. 149, *ante*.

(*e*) 16 & 17 Geo. V. c. 18.

(*f*) Petitions of Right belong to the Home Secretary (23 & 24 Vict. c. 34, s. 2); Indian government, since the Government of India Act, 1935, to the Secretary of State for India, who also acts as Secretary of State for Burma under the Government of Burma Act, 1935. Cf. Thomson, Secretaries of State, pp. 60, 61.

(*g*) (1765), 19 St. Tr. 1001; *Wilkes v. Wood* (1763), *ib.* 1153; *Entick v. Carrington* (1765), *ib.* 1029; *Sayre v. Rochford* (1775), 20 St. Tr. 1286.

or libel (*h*). Secretaries of State are appointed by the Crown by delivery of the seals, consisting of the signet, lesser or second secretarial seal, and the cachet. The office of the signet was abolished in 1851 and each department now uses its own seals. The signet is used in the Foreign Office on instruments authorising the affixing of the Great Seal to powers to negotiate and ratifications of treaties, in the Dominions and Colonial Offices on commissions and royal instructions; in the India and Burma Offices it authenticates royal instructions and commissions; the second seal is affixed to royal warrants and commissions in the War and Home Offices; the cachet is affixed to envelopes of letters addressed by the Crown to a foreign Sovereign. The Scottish Office has a special seal, representing the older Scottish seal.

### *Political Departments.*

**The Home Office.**—The Home Secretary, assisted by Parliamentary and permanent secretaries, now attends only to home affairs. His power is derived from his close personal relation to the King, his personal action in exercising on royal authority many prerogatives, and the entrusting to him of all statutory powers not specially committed to other Secretaries of State. The relations of the Crown with Northern Ireland, the Channel Islands, and the Isle of Man are in his control.

His duties comprise a variety of matters, such as the supervision and control of prisons, in which he is aided by the Prison Commission, criminal lunatic asylums, reformatories and industrial—now called approved—schools, and employment of children, white slave traffic, theatres, and cinematographs. With the Secretary of State for Scotland he controls the State Management District Councils for those areas where the sale of liquor is a state monopoly.

The Home Secretary advises the Crown in the exercise of its prerogative of mercy, which is effected by royal warrant (*i*) counter-signed by the Home Secretary, and may be by way of reprieve, commutation, or pardon (*k*). He administers the Extradition Acts, 1870—1935, advises the Crown as to the grant of separate Courts of Quarter Sessions to boroughs, and as to the appointment of recorders of boroughs, the assistant judge of the London sessions, stipendiary and metropolitan police magistrates, and the public prosecutor and his staff. He controls all arrangements as to the Metropolitan Police

(*h*) *R. v. Kendall* (1696), 12 St. Tr. 1359; *R. v. Derby* (1709), 14 St. Tr. 1014, n.; *R. v. Oxford* (1840), 4 St. Tr. (n. s.) 497. He can now, also as a Privy Councillor and on the commission of the peace, commit for any indictable offence. But the old practice was a device for enabling the Secretary to cross-examine persons arrested and extract admissions: Thomson, *Secretaries of State*, pp. 112—126.

(*i*) See p. 227, *post*. See, generally, Sir E. Troup, *The Home Office*. As regards appointments of bishops, the Home Secretary's duties are formal; he acts also as the channel of communication between the King and convocation. The formal appointment and procedure of Royal Commissions rest with him. Similarly, the formal instruments for creation of honours are signed by him, as also warrants authorising the wearing of foreign decorations, though the decision in these matters is that of the Foreign Secretary.

(*k*) He can ascertain the views of the Court of Criminal Appeal under the Criminal Appeal Act, 1907 (7 Edw. VII. c. 23), s. 19.

Courts, and appointments of clerks to justices of the peace require his confirmation.

The Home Secretary is also the means of communication between Crown and subject and receives and advises on petitions addressed to the Crown. In proceeding by Petition of Right (*l*), the petition must be left with the Home Secretary, who, upon the advice of the attorney-general that the case is a proper one, obtains the royal fiat—*Let right be done*.

In foreign affairs he is concerned by securing the recognition of the diplomatic privileges of foreign envoys, by controlling prosecutions under the Territorial Waters Jurisdiction Act, 1878, and by administering the Foreign Enlistment Act, 1870. In the Spanish civil war of 1936—37 much unexplained delay took place in enforcing that measure, many Irish citizens recruited for service with the rebels, being permitted to leave English ports in British ships, although the Act applies clearly to aid to either party in a civil war (*m*). He intimates the claim of the Crown to territorial jurisdiction in British waters, *e.g.*, the Bristol Channel (*n*).

The Home Secretary is also the principal officer for maintaining the King's peace. He administers the Foreign Enlistment Act, makes provisions for the enrolment of special constables, and, when necessary, calls in the aid of the regular naval, air or military forces (*o*). To him is given the control of the measures authorised by the Air Raid Precautions Act, 1937 (1 & 2 Geo. VI. c. 6), for organising protection for the population against air raids, which involve the co-operation of local authorities and much voluntary aid to secure safety from poison gas and incendiary bombs. The Air Raid Precautions Department issues an enormous mass of literature of advice, and in the crisis of September, 1938, secured the issue of gas respirators and construction of trenches: the Lord Privy Seal was given authority to secure precautionary measures. The Fire Brigades Act (1 & 2 Geo. VI. c. 72), gives supervisory power over the provision by local authorities of such safeguards. Vast plans for control of the country in time of war were announced in January, 1939, contemporaneously with a great scheme to secure volunteers for all kinds of national defence precautions; but neither policy received complete accord. He exercises a general control over the local, borough and City of London police, and the metropolitan police are directly under his supervision. He may also detain and open letters and telegrams in the Post Office (*p*), may authorise taking control of telegraphs (*q*) and of railroads and tramways (*r*), and restrain persons from leaving the kingdom by obtaining the issue of a writ of *ne exeat regno*, which is now generally

(*l*) See p. 33, *ante*.

(*m*) *R. v. Carlin*; *The Salvador* (1870), 6 Moo. P. C. N. S. 509.

(*n*) *The Fagernes*, [1927] P. (C. A.) 311.

(*o*) See Part VIII., Chap. II., *post*.

(*p*) Post Office Act, 1908 (8 Edw. VII. c. 48), s. 56 (2): see Anson, *The Crown* (ed. Keith), ii, 22 f. For his action in regard to police errors, cf. *Mr. Fitzpatrick's Case* (House of Commons, July 26, 1933).

(*q*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 52.

(*r*) Regulation of the Forces Act, 1871 (34 & 35 Vict. c. 86), s. 16.

confined to the case of absconding debtors under the Debtors Act, 1869 (s).

The Home Secretary also controls questions such as burials and cremation, vivisection, explosives and petroleum, and dangerous drugs, being aided therein by a statutory Poisons Board, and administers the various Acts relating to such matters as building societies, markets and fairs, sewers, drains, nuisances, and open spaces within the metropolis, employers' liability, factories and workshops. Certain powers in respect of registration of Parliamentary and local government voters, and elections have been handed over to him.

**The Foreign Office.**—The Secretary of State for Foreign Affairs is assisted by two Parliamentary under-secretaries, one specially concerned with League of Nations business, and a permanent under-secretary; the Secretary of the Department of Overseas Trade (Development and Intelligence) is appointed by him and the Board of Trade, and acts also as a Parliamentary Under-Secretary (t). There is also a Chief Diplomatic Adviser to His Majesty's Government, whose salary is provided for on the Foreign Office vote. He has a large staff and deals with the formulation and conduct of foreign policy; he controls the diplomatic and consular services and communicates with foreign ministers. The British relations with Egypt and the Anglo-Egyptian Sudan are conducted by him. Frequent representation of the United Kingdom at League of Nations meetings was for a time an essential duty. Passports fall under him.

In foreign affairs the Prime Minister and the Cabinet are specially interested, and important despatches and telegrams are circulated, while the King is kept still more fully informed. But it is alleged that reticence on these issues was unduly fostered by Queen Victoria, Lord Salisbury, and Lord Rosebery while Mr. Lloyd George complained of Sir E. Grey's secrecy, but probably unjustly (u). In his own régime he interfered unwisely with Lord Curzon's conduct of business, and in considerable measure superseded him, thus securing his co-operation in his overthrow in 1922 (x). Mr. Henderson's work was in 1924 closely controlled by Mr. MacDonald, but Mr. Baldwin was less inclined to intervention, a fact which may explain the fiasco in 1935 of the Hoare-Laval proposals as to Ethiopia. Mr. N. Chamberlain controlled foreign affairs, rendering Mr. Eden's resignation in February, 1938, inevitable, and personally negotiated at Berchtesgaden, Godesberg and Munich in September, 1938. In January, 1939, at Rome he was aided by Lord Halifax. In September

(s) 32 & 33 Vict. c. 62, s. 6.

(t) Overseas Trade Department (Secretary) Act, 1918 (8 Geo. V. c. 3), s. 1. See Tilley and Gaselee, *The Foreign Office* (1933), pp. 248—251, and *Ministers of the Crown Act, 1937*, s. 10 (2). In 1934, Mr. Eden was appointed Lord Privy Seal to deal especially with British concern with the League of Nations and Geneva, but in December, 1935, on Sir S. Hoare's resignation became Foreign Secretary; a separate Parliamentary Under-Secretary was retained until 1939.

(u) Lloyd George, *War Memoirs*, i, 46 ff.

(x) Ronaldshay, *Curzon*, iii, 204, 314.

he seems to have used neither the Permanent Under-Secretary nor the Diplomatic Adviser, but the Chief Industrial Adviser to the Government, an interesting revival of Mr. Lloyd George's mode of conducting foreign affairs.

**The Scottish Office.**—The Scottish Office dates from 1885, when a Secretary for Scotland was created by statute (*y*) to take over the duties with regard to Scotland formerly discharged by the Home Secretary, assisted by the Lord Advocate for Scotland, certain duties of the Privy Council, the Treasury, and the Local Government Board with relation to Scotland being handed over to him at the same time. By the Secretaries of State Act, 1926, the powers of the Secretary for Scotland were transferred to the Secretary of State for Scotland, whose appointment was made by Order in Council, July 26, 1926. He controlled and directed the Departments of Health and Agriculture and prisons (*z*), and administered the Scots Education Acts, as Vice-President of the nominal Committee of Council on Education in Scotland until 1939, when the departments were re-organised as branches of the Scottish Office, Health, Education, Agriculture, and a department to deal with prison and other business, under the Reorganisation of Offices (Scotland) Act. By a peculiar innovation, while the four officers in charge of the branches of the office have direct access to him, he has also a Permanent Under-Secretary in London; an odd position criticised in the Commons, December 13, 1938. He is also keeper of the Great Seal of Scotland (*a*). He also exercises, as regards Scotland, the duties of a principal Secretary of State (*b*), save as regards naturalisation, extradition, aliens, dangerous drugs, workmen's compensation, and certain powers as to factories and workshops, mines, explosives, and cruelty to animals. He is aided by a Parliamentary Under-Secretary.

Subordinate Offices are the General Register Department, and the General Board of Control. There are also advisory committees and commissions, the Sea Fish Commission, the Education Advisory Council, and the National Health Insurance Joint Committee.

**The former Irish Office.**—A Secretary for Ireland was first appointed by George II., and until the Union he acted as leader of the Irish House of Commons. After the Union his activities were transferred to the House of Commons, where he dealt at first with minutiae of Irish government, and as the Home Office ceased to intervene, came to control the Irish departments, being nominally President of the Local Government Board (*c*). The Chief Secretary to the Lord-Lieutenant for Ireland (or sometimes in his place the Lord-Lieutenant) was a member of the Cabinet, and responsible for the conduct of Irish affairs, which were administered by the Irish Office, the Lord-

(*y*) 48 & 49 Vict. c. 61.

(*z*) Reorganisation of Offices (Scotland) Act, 1928 (18 & 19 Geo. V. c. 34), s. 1 (1).

(*a*) This seal is used for all purely Scots matters: see 6 Anne, c. 11, Art. 24.

(*b*) See the Secretary for Scotland Act, 1887 (50 & 51 Vict. c. 52); 8 Edw. VII. c. 49, s. 2 (1). The functions of the War Office are not included (52 & 53 Vict. c. 16, s. 1).

(*c*) 35 & 36 Vict. c. 69, s. 3.

Lieutenant acting for the most part merely as the instrument for putting into force in Ireland measures which had been decided on by the Chief Secretary for Ireland. The Home Office acted as the formal means of communication between the Crown and the Lord-Lieutenant, but merely as a matter of routine. The office has now lapsed, the affairs of Northern Ireland being dealt with by the Home Office, those of the Irish Free State by the Dominions Office.

**The Colonial and Dominions Offices.**—Control of the Crown Colonies, protectorates, protected States, and mandated territories rests with the Secretary of State for the Colonies, assisted by a permanent and a Parliamentary Under-Secretary and the clerical staff of the department.

In July, 1925, a new Secretaryship of State for Dominion affairs was created, the office being conjoined to that of the Secretary of State for the Colonies until 1930, and temporarily in 1938—39, and as a result the Dominions Office, with Parliamentary and permanent Under-Secretaries, was set up to take over from the Colonial Office business connected with the self-governing Dominions, including the Irish Free State, the self-governing colony of Southern Rhodesia and the South African territories, Basutoland, Bechuanaland Protectorate and Swaziland, and also the business relating to the Imperial Conference and oversea settlement. The Oversea Settlement Board and Committee are connected with the Dominions Office.

The Imperial Institute has been placed under the control of the Colonial Secretary, assisted by an Executive Council. Under the Colonial Office fall the Crown Agents for the Colonies, who are the business and financial agents for the colonies. There is a Colonial Development Advisory Committee, a Standing Financial Committee, the Colonial Advisory Council of Agriculture and Animal Health, the Colonial Advisory Medical Committee, the Colonial Survey and Geophysical Committee, the Advisory Committee on Education in the Colonies, the Discovery Committee, the West African and East African Currency Boards, the Palestine Currency Board, and the Colonial Forest Resources Development Department. Connected with the Dominions and the Colonial Offices are a number of authorities charged with functions of varied kinds affecting imperial interests. These include the Imperial Economic Committee, whose functions in practice are rather limited; the Imperial Shipping Committee, which has close relations with the Board of Trade; the Imperial Communications Advisory Committee; the Imperial Forestry Institute; the Empire Forestry Conference, and the Standing Committee on Empire Forestry; the Empire Timbers Committee; the Executive Council of the Imperial Agricultural Bureaux; the Oversea Mechanical Transport Council; and the bodies which deal with issues of health in various aspects, the Imperial Institute of Entomology, the Imperial Mycological Institute, and the Bureau of Hygiene and Tropical Diseases.

**The India and Burma Offices.**—Down to 1858 the government of India was carried on by the East India Company, supervised from 1784 by a Government Board of Control in England. By the

Government of India Act, 1858, the government of India was transferred to the Crown, acting on the advice of the Secretary of State for India in Council (*d*). The Council, of which the Secretary of State was president, was under the Government of India Act, 1919, composed of members appointed by the Crown, not less than eight or more than twelve in number, as the Secretary of State determined (*e*). The cost of the office was, rather improperly, charged wholly to India, until under the reform scheme of 1919 a very modest share was assumed by the Imperial Treasury.

Under the Government of India Act, 1935, the Council disappears and the Secretary of State need only appoint up to six advisers on whose advice he may or may not act, except in a small number of cases affecting the interest of officials. The British Government assumes the cost of the India Office establishment save in respect of services rendered. There is a similar arrangement for Burma under the Government of Burma Act, 1935, but the maximum number of advisers is three.

**The War Office.**—*History (f).*—Prior to 1835 the control of the army was confused and divided. The office of Secretary-at-War can be traced as early as 1642, and definitely from 1661 he served as Secretary to the Commander-in-chief. After 1670, when that office fell vacant, he acted as Secretary to the King, countersigning his orders as to the administration of the forces. Later, on the relinquishment by the King of the command-in-chief, the royal pleasure in such matters fell to be communicated by the Commander-in-chief, and the Secretary-at-War's powers were confined to finance and the Mutiny Act and its regulations (*g*). The Commissariat was cared for by the Treasury. The Master General of the Ordnance (1483), a political officer, provided material, controlled and equipped artillery and engineers. The Commander-in-chief controlled (*h*) discipline, appointments, promotions, &c., in cavalry and infantry, for whom clothing was provided by a Board of General Officers. Political control was in the hands of the Secretary of State, for the Southern Department as a rule, and he remained in control of the reserve and the forces on the home establishment, when the general policy as to the army, its numbers, and the movements of forces in the colonies and abroad were handed over to a Secretary of State for War in 1794, the latter also discharging the duties of Colonial Secretary. The two offices of Secretary-at-War and Secretary of State for War existed side by side until 1854, when, owing to the pressure of business entailed by

(*d*) 21 & 22 Vict. c. 106; Keith, *Constitutional History of India, 1600—1935*, pp. 164 ff.

(*e*) 9 & 10 Geo. V. c. 101, s. 31.

(*f*) For the account here given of the history of the War Office, see Clode, *Military Forces of the Crown; Report of the War Office (Reconstitution) Committee, 1904* (Parl. Pap., 1904, Cd. 1932, vol. viii); H. Gordon, *The War Office* (1935).

(*g*) Lord Bath in 1749 (Parl. Hist., xiv, 479) declared himself a ministerial officer only, much as W. Blathwayt was under William III.; but in 1789 responsibility to the Commons was admitted (*ib.* xxvii, 1310 ff.), and reinforced by Lord Palmerston (1809—28); Clode, ii, 689—723.

(*h*) The King in 1793 abandoned personal control and the office of commander-in-chief came into being.

the Crimean War, it was found necessary to separate the duties of the Colonial Secretary and of the Secretary of State for War, and the two offices of Secretary-at-War and Secretary of State for War were combined in the same person. The powers of the Ordnance Board were transferred to the new officer (*i*), the Treasury surrendered control of the Commissariat, the Board of General Officers and the Army and Ordnance Medical Department also were absorbed in the War Office, which also undertook the audit of its accounts.

The office of Secretary-at-War was abolished by the Secretary-at-War Abolition Act, 1863 (26 & 27 Vict. c. 12), his duties being amalgamated with those of the Secretary of State for War. The conduct of military matters was henceforth centralised in the War Office under the dual control of the Secretary of State for War and the commander-in-chief. Under this arrangement, final responsibility rested in theory, as asserted by a memorandum by the Queen in 1861, on the Secretary of State, but in practice the commander-in-chief claimed a large measure of independence as regards all forms of patronage, a position strengthened by his relationship to the Queen. But Mr. Cardwell, from 1868, imposed political control and in 1870, by statute and Order in Council, the War Office was definitely divided into three departments, military, ordnance, and finance (*k*), all under his control. In 1888, a further reorganisation took place, as the result of Sir G. Wolseley's experience of defects in transport and supply during the Nile expedition. The War Office was divided into a military and a civil side, the commander-in-chief as the head of the military side advising the Secretary of State on all military matters. The duties of the commander-in-chief under this system were found to be too onerous, and the Hartington Royal Commission in 1889—90 recommended the abolition of the office, the appointment of a Chief of Staff and a War Office Council (*l*). The Queen objected to the "abominable report," and only by Order in Council, November 21, 1895, on the retirement of the Duke of Cambridge and Lord Wolseley's appointment in his place, was a small change made, and four officials were appointed to assist him. These were the adjutant-general, the quartermaster-general, the inspector-general of ordnance, and the inspector-general of fortifications; they had the duty of advising the Secretary of State upon matters connected with their several departments, subject to the supervision of the commander-in-chief.

This arrangement was, however, found to work unsatisfactorily during the South African War (*m*), and in 1901 a further distribution of duties was made by Order in Council (*n*) amongst the commander-in-chief and eight officials at the head of their corresponding departments.

(*i*) Clode, ii, 251—272, who points out the disadvantages involved.

(*k*) 33 & 34 Vict. c. 17; Order in Council, June 4, 1870; Parl. Pap., C. 164.

(*l*) Parl. Pap., C. 5979 (1890). Lord Beaconsfield's condemnation of the Duke of Cambridge in 1879 was categorical: Monypenny and Buckle, ii, 1345 f.

(*m*) Parl. Pap., Cd. 1789 (1902). The commander-in-chief had failed to pass on reports of the intelligence branch to the Secretary of State: cf. Mr. Balfour's defence, Dugdale, i, 304 ff.

(*n*) Order in Council, November 4, 1901.

The reform of military administration did not end here, and as the result of the report made by the War Office Reconstitution Committee of Inquiry under the presidency of Lord Esher in the year 1904, still wider and more sweeping changes were made in the organisation of the War Office (o). The report of this committee attributed the previous inefficiency in the administration of military matters to five principal causes: (1) the lack of a special body in the War Office to consider questions of policy only as opposed to routine; (2) the divorce of real power vested in the commander-in-chief from the responsibility of the Secretary of State; (3) the centralisation of administrative duties with executive command in the commander-in-chief; (4) the excessive burden of duties imposed on that authority; and (5) the lack of a permanent nucleus to the defence committee of the Cabinet.

*Constitution of the Army Council.*—Parts II. and III. of this report, dealing with the creation of the Army Council, and the appointment of inspectors-general, were adopted by the Government and put in force, the office of commander-in-chief having been abolished, and the members of the Army Council subsequently appointed by letters patent of February 6, 1904.

The Army Council as constituted in 1904 was subsequently modified and reconstructed in 1938 as (p): (1) Secretary of State (President); (2) Under-Secretary of State (Vice-President); (3—7) five military members, Chief of the Imperial General Staff—a style accorded in 1909—, Adjutant-General, Quartermaster-General, Director-General of Munitions Production, Director-General of the Territorial Army; (8) finance member (Financial Secretary); (9) the Permanent Under-Secretary, who is also Secretary. The duties of the Council as set forth by the letters patent are to administer matters pertaining to the military forces and the defence of His Majesty's dominions with such power and authority as has hitherto been exercised under the royal prerogative by the Secretary of State, the Commander-in-chief, and other officers acting under the Secretary of State. The Council is also endowed with full power and authority to appoint such officers for the conduct of the business of the civil departments of the military service as they shall think fit, and to make contracts and do all other things which may seem necessary in their discretion (q). The signature of the Council is to be affixed by any two of its members.

*Functions of the Army Council.*—The duties and functions of the various members of the Council have been defined by Order in Council (r) as follows:—

The Secretary of State is to be responsible to His Majesty and Parliament for all the business of the Army Council.

All business, other than business which the Secretary of State

(o) *The Times*, February 1, 1904; Parl. Pap. Cd. 1932, 1968, 2002.

(p) King's Regs. for the Army (ed. 1923), Reg. 9; Order in Council, March 21, 1924; Secretary of State, House of Commons, March 10, 1938.

(q) See the *London Gazette*, February 12, 1904.

(r) Orders in Council, August 10, 1904; August 2, 1910; October 13, 1922; December 17, 1931. The statutory duties and powers formerly exercised by the commander-in-chief are transferred to the council by statute: see 9 Edw. VII. c. 3.

specially reserves to himself, is to be transacted in the following principal divisions:—

- (1) The Parliamentary Under-Secretary deals with Territorial Army Associations, and War Department lands;
- (2) the military members of the Army Council are responsible to the Secretary of State for so much of the business relating to the organisation, disposition, personnel, armament, and maintenance of the Army as shall be assigned to them;
- (3) the finance member of the Army Council is responsible to the Secretary of State for the finance of the Army;
- (4) the Permanent Under-Secretary acts as secretary of the Army Council, and is charged with the interior economy of the War Office, and the preparation of all official communications of the Council, and with such other duties as the Secretary of State may from time to time assign to him. As accounting officer of Army votes he has control of expenditure and advises the War Office and the commands on financial issues.

The office of Inspector-General, created in 1904, was modified in 1910 by the creation of an Inspector-General of the Overseas Forces into an Inspector-General of the Home Forces. The offices lapsed in 1914, the duties being taken over by the Chief of the Staff.

**The Air Ministry.**—By the Air Force Constitution Act, 1917 (7 & 8 Geo. V. c. 51), an Air Council was established which took over the powers, duties, &c., of the Air Board constituted by the New Ministries and Secretaries Act, 1916, whose activities were confined to aircraft supply. The Air Board was given control over an amalgamated Royal Flying Corps and the Royal Naval Air Service. Civil air navigation was assigned to it by the Air Navigation Act, 1920 (10 & 11 Geo. V. c. 80). As reconstituted by Order in Council of July 28, 1938, the Air Council consists of the Secretary of State for Air, the Under-Secretary, whose special field is civil aviation, the Chief of the Air Staff, who deals with disposition, command, collective training and communications of the force, the Air Member for Personnel, the Air Member for Supply and Organisation, the Air Member for Development, and the Secretary, who deals with finance as accounting officer, correspondence, and communications; he is also Secretary of the Air Ministry. Three members are a quorum, but documents may be signed by two members. The King appoints the Chief of the Air Staff, the Secretary of State the other members. The Ministry is responsible for the organisation, disposition, personnel, equipment, armament, and maintenance of the Royal Air Force, the development and regulation of civil aviation, and the encouragement of aeronautical research. The Meteorological Office forms part of the Ministry. The Secretary of State (s) has enormous powers in war or emergency to control air navigation, to take possession of aerodromes, aircraft, &c., and regulate the use of aerodromes, flying schools, or landing grounds; compensation is payable.

(s) 10 & 11 Geo. V. c. 80, s. 7; 26 Geo. V. & 1 Edw. VIII. c. 44.

**The Imperial Defence Committee of the Cabinet.**—The Defence Committee of the Cabinet was originally formed in 1895 to consider wide questions connected with the defence of the Empire where the joint operation of the naval and military forces was concerned. It was originally composed of the Prime Minister, the heads of the Admiralty and War Office, the First Lord of the Treasury, and the Colonial Secretary. Its constitution was, however, remodelled by Mr. Balfour in 1902, and from 1903 consisted of the Prime Minister and such other members as, having regard to the nature of the subject to be discussed, he might from time to time summon to assist him (*t*). A Dominion representative first sat on December 11, 1903. Though subject to change or modification, the committee now appears normally to include the Prime Minister, the Deputy Chairman, who is the Minister for the Co-ordination of Defence, the Secretaries of State for Home Affairs, War, Air, Foreign Affairs, Dominion Affairs, the Colonies and India, the Chancellor of the Exchequer, the Parliamentary Under-Secretary of State for Foreign Affairs, the Permanent Secretary to the Treasury, the First Lord of the Admiralty, the Chiefs of Staff of the three fighting services, and such other persons as may be deemed specially qualified to assist with advice, including Dominion ministers, High Commissioners, or experts. Members of the opposition are at times invited, as was Mr. Balfour in 1913, and Lord Esher was virtually a permanent member. The committee works largely by committees and sub-committees. The three chiefs of staff are made individually and collectively responsible for advising on defence policy as a whole, the three serving as the super-chief of a war staff in commission and meeting together to discuss issues affecting their joint responsibilities. The committee is responsible for the strategical plans to give effect to British war policy. Its annual report on the needs of national defence is considered by the committee and then by the Cabinet, which decides the policy for the year and in connection therewith the estimates. This is an essential substitute for the older contests between departments and Treasury. Planning is dealt with by a Joint Planning Committee, consisting of the Directors of Plans in the three departments and one officer of each service, graduates of the Imperial Defence College; the Minister for Co-ordination since 1936 is chairman of the Principal Supply Officers' Committee on joint supply questions. There is a Man-Power Committee on personnel, the Defence of India Sub-Committee, the Middle East Sub-Committee, the Ordnance Committee, the Chemical Research Committee, the Joint Wireless Telegraphy Committee, the Small Arms Ammunition Committee, &c. Training in strategy is given since 1927 by the Imperial Defence College, which is open also to officers of the Dominion forces.

Until 1904 there was no permanent staff or secretariat to keep permanent records of the work of the committee, or assist the committee in its duties. But, as a result of the recommendation of

(*t*) Treasury Minute, May 4, 1904; 191 H. C. Deb. 5 s. 1527; see Dugdale, Arthur James Balfour, i, 365—370. For the annual report, see 287 H. C. Deb. 5 s. 1231 ff. (1934).

the War Office Reconstitution Committee (*u*) of that year, a permanent staff was appointed, consisting of a secretary and assistant secretaries. The duties of the secretariat are: (1) to preserve a record of the deliberations and decisions of the committee; (2) to collect information and statistics connected with questions of Imperial defence, and prepare memoranda thereon for the use of the committee; (3) to make possible a continuity of method in the treatment of the questions which come before the committee independent of party politics.

The committee may, therefore, now be ranked under the head of a permanent Government department. Its functions, however, being purely consultative or advisory, the secretariat has no administrative or executive power, and any decisions arrived at by the Committee are carried out by the heads of the various departments concerned (*x*).

Relations between the Committee and the Cabinet since July, 1935, have been mediated by a Cabinet Sub-Committee on Defence Policy and Requirements, consisting of the Prime Minister, the Secretary of State for Foreign Affairs, the heads of the service departments and others. It secures co-ordination of foreign policy and defence, and it devised the plans for expansion of defence preparations which were approved by the Cabinet (*y*).

**The Ministry for Co-ordination of Defence.**—The creation of a single ministry of defence was recommended by the Committee on National Expenditure in 1922, but the project has repeatedly been rejected on the ground that the task would be beyond the capacity of any individual and lead to confusion. On the other hand, the work of presiding over the Committee of Imperial Defence was given to a nominee of the Prime Minister from 1920 to 1924, but has since been resumed by him, on the ground that he must deal with vital issues of defence and expenditure therewith connected so as to decide issues in the Cabinet. Even in 1936 he refused to alter this view, but created a ministry to co-ordinate defence with Cabinet rank and salary (£5,000). The minister is Deputy-Chairman of the Committee of Imperial Defence and of the Defence Policy and Requirements Committee, Chairman of the Principal Supply Officers' Committee, and, though he does not normally preside at the Chiefs of Staff Committee, he may convene it if he thinks it desirable and is in constant touch with it. He supervises and controls the whole organisation and activity of the committee, co-ordinates executive action, and reports, and takes up points on which progress is slow (*z*). In particular he has been engaged in seeking to accelerate production of aircraft and to combat—not very successfully—profiteering among suppliers of munitions. In 1937—39 his efforts were also necessary to secure the placing of munition factories in distressed areas. A demand for a Ministry of Supply was firmly refused in 1938 as unnecessary, but in

(*u*) See p. 179, *ante*. See also Parl. Pap., Cd. 1938.

(*x*) For this account of the early constitution of the Defence Committee, see Treasury Minute, May 4, published in *The Times*, August 3, 1904.

(*y*) Parl. Pap., Cmd. 5107, p. 13.

(*z*) See Parl. Pap., Cmd. 2029 (1924), 5107 (1936); 287 H. C. Deb. 5 s. 1321; 309 *ib.* 659 ff.

January, 1939, a naval expert, Lord Chatfield, replaced Sir T. Inskip in the ministry, despite the advantages originally claimed for a civil appointment.

**The Admiralty.**—The duties of the Lord High Admiral are now performed by “commissioners for executing the duties of the Lord High Admiral of the United Kingdom,” appointed by letters patent (*a*). The commissioners, who are ten in number, comprise a first lord, who is always a Cabinet Minister, a first sea lord and chief of the naval staff, a second sea lord and chief of naval personnel, a third sea lord and controller, a fourth sea lord and chief of supplies and transport, a fifth sea lord and chief of naval air services, a deputy and an assistant chief of naval staff, a Parliamentary and Financial Secretary, and a civil lord; these are assisted by a permanent secretary appointed by the board, who is responsible for correspondence, for discipline of the London establishments, and maintaining continuity of policy. The sole responsibility rests with the First Lord under Order in Council of January 14, 1869. The First Sea Lord deals with operations and movements, and naval staff work; the Third with provision of ships and armaments and work of the dockyards; the Civil Lord with labour questions and provision of works and buildings. The Admiralty has certain powers as to dockyards and harbours, and its licence has from time to time been made necessary for building or equipping ships, so as to secure observance of the limitation clauses of international treaties. It controls also Greenwich Hospital, the Royal Observatories, and the Nautical Almanac Office.

**The Board of Trade.**—The origin of this body is to be found in the councils created by Charles II. in 1660 to advise on matters connected with Trade and Plantations. After various changes William III. created, by letters patent, in 1696 a committee, partly manned by Privy Councillors and members of Parliament (*b*), under the name of the “Board of Trade and Plantations,” which existed down to 1782, when it was abolished by statute, it being provided that the business of the board should be transacted by such committee or committees of the Privy Council as His Majesty should be pleased to appoint (*c*).

Since that date the new board, as it was formally named in 1862, has continued nominally to exist, its duties being in practice from an early date discharged by the president, who is appointed by a minute of the Privy Council, assisted by a Parliamentary and a permanent secretary (*d*) at the head of the permanent clerical staff of the

(*a*) The patent does not divide responsibility; a new patent is issued on every change in membership. See Parl. Pap., C. 5979 (1890).

The Board is constituted by Order in Council, November 5, 1929, as the Commissioners with the Permanent Secretary.

(*b*) Keith, Constitutional History of the First British Empire, pp. 273 ff.

(*c*) 22 Geo. III. c. 82, s. 15; Order in Council, August 23, 1786, still unrevoked.

(*d*) A Parliamentary secretary was appointed by the 30 & 31 Vict. c. 72, to take the place of the old vice-president. The power of the president to sit in the Commons under 7 Geo. IV. c. 32, assigning him a salary, was inadvertently repealed by the Board of Trade Act, 1909 (9 Edw. VII. c. 23), when removing the limit of £2,000 on his salary; the error was repaired and excused *ex post facto* by the President of the

department. The board has ceased to take any part in colonial affairs since 1854, when a separate Secretary of State was created for the colonies (e). Its consultative duties gradually diminished under free trade, the Foreign Office taking over control of commercial negotiations especially after 1865, but its administrative and regulative powers grew, though reduced in certain respects by the creation of the Ministry of Transport.

The department registers ships and administers merchant shipping through its marine department under the many Acts (f). It collects home and foreign trade statistics, and generally looks after the interests of British commerce. It has been given much extra work as a result of the adoption of protection and tariff bargaining which it shares with the Foreign Secretary and the Treasury, as in the lengthy negotiations for a trade treaty with the United States in 1936—38. Under the Import Duties Act, 1932 (22 & 23 Geo. V. c. 8), it has authority to impose, subject to Parliamentary confirmation, special duties on imports from countries which discriminate against British trade. It is vitally concerned, along with the Ministry of Agriculture and Fisheries in tariff arrangements with the Dominions, such as the Ottawa Agreements of 1932 and their modifications in 1937—39. It controls and supervises grants of patents, trade marks, and designs; keeps the standard of weights and measures; supervises bankruptcy proceedings in their non-legal aspect, and the registration and winding-up of joint stock companies, and administers a variety of statutes relating to such matters as water and gas companies, and the maintenance of lighthouses. Its former powers in respect of railway and tramway companies, of electricity, and, in the main, of harbours, have been handed over to the Ministry of Transport in 1919 and 1922. It is entrusted with assertion of the Crown's interest in the foreshore, in which the Commissioners of Crown Lands are also interested.

In 1938 the Essential Commodities Reserves Act imposed on it the power to acquire stores of such commodities, in part as a war precaution.

The Overseas Trade Department (Secretary) Act, 1918 (8 & 9 Geo. V. c. 3), provides for the joint appointment by the Board of Trade and the Foreign Secretary of a Secretary of the Overseas Trade Department (g). It has an advisory committee for the grant of credits for overseas trade. The importance of this work was recognised in 1938 with the increase of the sum permissible to £75,000,000, £10,000,000 being available for loans where political reasons rendered it desirable to take non-commercial risks. Such a policy has been

Board of Trade Act, 1932 (22 Geo. V. c. 21). It has not been held worth while destroying the formal character of the board by changing it into a Ministry for Commerce and Industry as recommended by a committee in 1904.

(e) For a long time Colonial Acts used to be referred to the board for consideration as before 1782, but this practice gradually was discontinued, Acts no longer being formally decided on by a report of the Privy Council.

(f) A formidable list of Acts, regulations, &c., is issued annually. A Tramp Shipping Subsidies Committee advised as to allocation of subsidies and a Ship Replacement Committee on scrapping and replacing vessels. See Parl. Pap., Cmd. 5084, 5129, 5291; 26 Geo. V. & 1 Edw. VIII. c. 12.

(g) See Ministers of the Crown Act, 1937, s. 10 (2).

adopted towards Turkey. There is in addition the Mines Department, which is also represented in Parliament by a Parliamentary secretary (*h*), who appoints the members of the Miners' Welfare Fund Committee (*i*), and the Coal Mines National Industrial Board (*k*). Very important functions are exercised by the Board in regard to the rationalisation of the industry, which was formerly the business of the Coal Mines Reorganisation Commission and now of the Coal Commission constituted under the Coal Act, 1938. That body has vested in it from July 1, 1942, the ownership of all coal, and is charged with exercising its rights to secure the interests, efficiency and better organisation of the coal mining industry. The compensation to owners (£66,450,000, as fixed by an impartial committee), is to be allocated by Valuation Boards appointed by the Board of Trade, and the securing of better terms for its output from foreign countries as in the commercial treaties with Germany, Denmark, &c. in 1933—37. There is an advisory committee for coal and the coal industry.

The board has an advisory council, including representatives of commerce, industry, finance, labour, and the Dominions and India, which regularly meets under the President. There are also statutory committees dealing with cinematograph films, dyestuffs, the importation of plumage, merchandise marks, and food supplies and prices, the relations of art and industry and the cotton spinning industry, regulation of which is provided for through a Spindles Board under the Cotton Spinning Industry Acts, 1936 and 1939.

**The Treasury Board and the Exchequer.**—Originally the collection of the revenue was attended to by the Lower Exchequer of Receipt, and this duty has now devolved upon four departments—the Customs, the Inland Revenue, the Post Office, and the Commissioners of Crown Lands—and by these the public revenue is now collected and paid to the credit of the Exchequer account at the Bank of England, which is termed the Consolidated Fund.

The King at one time personally attended meetings of the Treasury Board, but, when George III. surrendered a large portion of the hereditary revenues and received a civil list, he ceased attendance and other members also dropped off, the meetings became formal, and ceased in 1856.

Accounting for and control of revenue was dealt with in the Upper Exchequer, and the Treasurer was the link between the departments. Under Richard I. the Chancery was separated from the Exchequer, and the Great Seal ceased there to be used, the Exchequer seal being entrusted under Henry III. to a new officer, the Chancellor of the Exchequer. By the sixteenth century the Treasurer, now styled Lord High Treasurer and Treasurer of the Exchequer, is a great officer who cannot do detailed business; from 1612 when the office is first put in commission, as finally in 1714, the Treasury is a distinct department controlling the issue of funds, in the manner described below

(*h*) Mining Industry Act, 1920 (10 & 11 Geo. V. c. 50), s. 1.

(*i*) *Ib.* s. 20 (3).

(*k*) Coal Mines Act, 1930 (20 & 21 Geo. V. c. 34), s. 15.

(Part VI., Chap. II.). The Treasury Board is composed of the First Lord of the Treasury, who is usually the Prime Minister and leader of the House of Commons, the Chancellor of the Exchequer, and, since 1848, three junior lords, together, usually with two junior lords formerly unpaid, for whom salaries were provided by the Ministers of the Crown Act, 1937 (s. 1). These are appointed by letters patent, but do not act as a Board. The First Lord's activities are confined to his share as Prime Minister in determining financial policy and in deciding issues on which the Chancellor of the Exchequer disagrees with other departments. He has a good deal of patronage, and is aided by the Parliamentary Secretary (formerly called the Partonage Secretary) whose business it is to act as chief government whip, with the aid of the junior lords. The Chancellor is not merely a member of the Board, but is appointed Chancellor and Under-Treasurer by separate patents and delivery of seals, and is assisted in Parliament by the Financial Secretary, who represents in the Commons also the Privy Council Office, the Charity and Civil Service Commissions, the Exchequer and Audit Department, the Record Office, the British Museum, National and National Portrait Galleries, Friendly Societies Registry, and the Development Commission. The Permanent Secretary is appointed by the Prime Minister, is the head of the Civil Service and advises on promotions, rewards, &c., and there is a large staff, including a Second Secretary.

The Chancellor's activities cover since the Union Scots finance; Irish finance was dealt with separately until 1816. His business is to secure preparation of the departmental estimates, to discuss them if necessary with the departments, and adjust the method of supplying the funds needed. He should consider (1) the maximum expenditure which can safely be undertaken; (2) the best allocation thereof; and (3) the least burdensome and most socially advantageous method of raising the cost. He is responsible for the budget as mentioned below (l).

In addition to his duties at the Treasury, the Chancellor also had duties, which were chiefly nominal, in connection with the boards, now superseded by the Ministry of Health and the Ministry of Agriculture and Fisheries, and the Board of Education (m) of which he still is an *ex officio* member. He is also Master of the Royal Mint (n), and presides in Court at the annual appointment of sheriffs (o), though his judicial functions ended in 1873.

Closely connected with the Treasury is the department of the Comptroller and Auditor-General, an office created by the Exchequer and Audit Departments Act, 1866 (p), to take the place of the Comptroller-General of the Exchequer. The Comptroller and Auditor-General is appointed by letters patent, and holds during good behaviour, but may be removed also (q) by the Crown on an address from both

(l) See p. 394, *post*.

(m) See pp. 188, 190, 192, *post*.

(n) See the Coinage Act, 1870 (33 Vict. c. 10, s. 14).

(o) See Part IX., Chap. I., *post*.

(p) 29 & 30 Vict. c. 39. An Assistant Comptroller and Auditor was then provided for, but the post was abolished by the Exchequer and Audit Departments Act, 1921 (11 & 12 Geo. V. c. 52), s. 8.

(q) *Ib.* s. 3.

Houses of Parliament. He may not be a member of either House of Parliament nor hold other paid office at royal pleasure. His salary is charged upon the Consolidated Fund; he is thus beyond the reach of party or personal influence.

The essential functions of the Comptroller and Auditor-General are: (1) to authorise the issue of funds on proof of appropriation by Parliament; and (2) to audit the expenditure of those funds, as will later be explained (*r*).

The Paymaster-General's post is conferred by sign manual warrant, and is political and honorary, for the duties are carried out by the Pay Office under powers granted by him, or customary. If, as in normal, in the House of Lords, he lends political assistance. The Office supersedes minor departments under statutory powers (*s*).

The Parliamentary counsel, now numbering five with four assistants, are appointed by Treasury minute, and have the onerous task of drafting governmental bills and dealing with proposed amendments. Their services are not at the disposal of private members, a fact which in part explains the concentration in government hands of control of legislation.

Minor departments subordinate to the Treasury include, beside those already mentioned, the Development Commission, the Forestry Commission in some degree, the Civil Service Commission, the *London Gazette* Office, the British Museum, the National Gallery and the National Portrait Gallery, the Wallace Collection, the Stationery Office, the Meteorological Office (controlled for administration by the Air Ministry), the Central Registry for Friendly Societies, and the Government Actuary's Office. There are also under it the offices of Procurator-General and Solicitor to the Treasury and King's Proctor, and in Scotland King's and Lord Treasurer's Remembrancer. It has a permanent Import Duties Advisory Committee under the Import Duties Act, 1932, and there are the National Savings Committee, the University Grants Committee, and the Trustee Savings Bank Investigation Committee.

The National Debt office and the Public Works Loan Board are not technically subordinate to the Treasury, but in fact are dependent on the Chancellor of the Exchequer, who has certain powers of control also over the Bank of England. More important, however, is his authority to secure the adoption of definite financial policies by the Bank (*e.g.*, restriction of loans abroad or purchases of securities) by his suggestion and by his control of the Exchange Equalisation Fund.

**The Post Office.**—The Post Office is one of the four revenue-receiving departments, the other three being the Customs, the Inland Revenue, and the Commissioners of Crown Lands. These departments, however, differ from the Post Office in that they have no political head and are directly subordinate to the Treasury, though the Commissioners of Crown Lands are more closely connected with the Ministry of Fishery and Agriculture.

(*r*) See Part VI., Chap. II., *post*.

(*s*) 5 & 6 Will. IV. c. 35; 11 & 12 Vict. c. 53. Treasury control is provided under 52 & 53 Vict. c. 53, s. 1.

The head of the department is the Postmaster-General, whose office as statutory dates from 1710. Until 1866 (*t*) the office was incompatible with a seat in the Commons and from 1823 was normally held by a peer, becoming definitely political in 1837. He is appointed by letters patent. He is sometimes a member of the Cabinet, and is assisted in his duties by a permanent secretary; in 1909 provision was made for an Assistant Postmaster-General, who may sit in the Commons. There is now a Post Office Board, which secures effective participation of the technical officers in determining postal policy. Under various statutes passed in 1837 consolidated in 1908, and later added to, the Post Office enjoys the monopoly of the carriage of letters, newspapers, and telegrams, and also of telephonic communications (*u*). It is concerned also with international agreements for carriage and rates, the United Kingdom being a member of the International Postal Union and party to many conventions, including those on radio-telegraphy. In all matters of principle the office has been under close Treasury control, but it is now accepted that after returning a revenue of £10,750,000 to the Exchequer, the office should have a wider control of the surplus, and be freer to expand on business lines (*x*).

The Postmaster-General is responsible for the control exercised over the British Broadcasting Corporation, which is a chartered corporation in charge of broadcasting. In emergency, the complete control of transmission may be taken over, and at any time a government department may require transmission of information, or the Postmaster-General may forbid transmission of any matter. The importance of these powers in case of serious domestic unrest is plain. The members of the Board of Governors are appointed by the Crown, the Prime Minister having the final selection. The Corporation receives the total of licence fees and payments by licensees to the Postmaster-General less 10 per cent., and £1,050,000 (*y*).

**The Ministry of Health.**—This department, whose title is inadequate, was created by the Ministry of Health Act, 1919 (*z*), to exercise powers with respect to health and local government and to do the work which was formerly done by the Local Government Board, which has been abolished. Its head is the Minister of Health, who has a seat in the Cabinet and is assisted by a Board of Health for Wales, a Parliamentary secretary and other secretaries and officials. He has the advice of a Central Housing Advisory Committee, and shares with the Department of Health for Scotland the services of the National Health Insurance Joint Committee and the Therapeutic

(*t*) 29 & 30 Vict. c. 55.

(*u*) *Att.-Gen. v. Edison* (1880), 6 Q. B. D. 244.

(*x*) Parl. Pap., Cmd. 4149 (1932); 280 H. C. Deb. 5 s. 2255 ff.; Finance Act, 1933 (23 & 24 Geo. V. c. 19), Part IV.; 1 Edw. VIII. & 1 Geo. VI. c. 54, s. 32.

(*y*) See Parl. Pap., Cmd. 5329 (1936) for charter and licence from Postmaster-General; annual report, Cmd. 5088 (1936); on staff issues, the *Lambert v. Levita* case report, Cmd. 5337 (1936); the Prime Minister's minute, March 8, 1937; Cmd. 5405. In 1938 the appointment of a new head marked a definite advance towards the introduction of more normal conditions of staff control.

(*z*) 9 & 10 Geo. V. c. 21.

Substances Joint Committee. Old age pensions, whether non-contributory or under the Widows', Orphans', and Old Age Contributory Pensions Acts, are under the final control of the department. The powers and duties of this department include the powers and duties of the Local Government Board and of the Insurance Commissioners, the powers and duties of the Board of Education with respect to the health of mothers and children (*a*), the powers of the Privy Council under the Midwives Acts, the powers given under the Housing Acts, and other powers and duties relating to the health of the people. By Order in Council the Crown may transfer to the Minister any other powers and duties relating to the health of the people. The Minister also controls the poor law or public assistance, and exercises the power of general supervision of local authorities, especially in matters of finance, and of water undertakings.

The General Register Office, which deals with population records, and the Board of Control, which is concerned with persons of unsound or defective intellects, are under his control, and he has duties in connection with the Central Midwives Board and the Nurses' Registration Council.

**The Ministry of Transport.**—This department was created by the Ministry of Transport Act, 1919 (9 & 10 Geo. V. c. 50), for the purpose of improving the means of and facilities for locomotion and transport. The department is presided over by a Minister, now of Cabinet rank, who changes with the Government and is assisted by a Parliamentary and a Permanent Secretary. There are advisory committees for roads, tramways, and transport; London Transport problems fall to a London and Home Counties Advisory Committee; rates to another committee. There are transferred to the department all powers and duties of any Government department in relation to railways, light railways, tramways, canals, waterways, roads, bridges, ferries and vehicles and traffic thereon, harbours and docks, and in relation to any undertaking, body or board (except the Railway and Canal Commission and a department or body having jurisdiction in dockyard ports). He appoints and controls the Electricity Commissioners, with the concurrence of the Board of Trade in appointments (*b*). The appointment of the Central Electricity Board of eight members is made by him and their period of office—five to ten years—determined by him; they cannot be members of the Commons (*c*). It supplies electricity in bulk to electricity undertakers and railway commissioners. The London Passenger Transport Board is in part subject to his control, and a Standing Joint Committee on London Transport secures relations with the main line railways which are outside the Board's control (*d*). The licensing authorities, and traffic

(*a*) Medical inspection of school children is regulated under the Education Act, 1921 (11 & 12 Geo. V. c. 51).

(*b*) Electricity (Supply) Act, 1919 (9 & 10 Geo. V. c. 100), ss. 1, 39. He can exercise his powers with regard to joint electricity authorities and other authorised electricity undertakers through them (s. 2).

(*c*) Electricity (Supply) Act, 1926 (16 & 17 Geo. V. c. 51), s. 1.

(*d*) See London Passenger Transport Act, 1933 (23 Geo. V. c. 14). It controls the railways, tramways, buses and coaches of the area; its Chairman receives £12,500 a year.

commissioners under the Road and Rail Traffic Act, 1933, and the Road Traffic Acts, 1930—37, are subject to his general instructions, but act in most issues semi-judicially. In certain cases appeal lies to him from traffic commissioners. By an exception to the normal rule he can be sued in contract and tort (*e*).

**The Ministry of Labour.**—This department was created under the New Ministries and Secretaries Act, 1916 (*f*). Its head is the Minister of Labour, who has a seat in the Cabinet. There is also a Secretary with a seat in Parliament and a Permanent Secretary with a large clerical staff. Advice is given by the Unemployment Insurance Statutory Committee and Cotton Industry Boards. The department took over certain work from the Board of Trade and from the Treasury and is responsible for industrial arbitration, conciliation, labour exchanges, trade boards, unemployment insurance, labour statistics and the like. Under the Unemployment Act, 1934, the Minister is given responsibility for all able-bodied unemployed; the fund is placed under an Unemployment Assistance Board only under control as regards principles; its members do not hold office at the Minister's pleasure, and Parliament exercises authority over rules made by it. Power is also reserved to the Crown to assign to it other duties by Order in Council. The Minister is also responsible for the Industrial Court (*g*) and the appointment of Special Courts of inquiry into trade disputes. Other semi-judicial bodies with which he is connected are the courts of referees and the umpire in questions of unemployment insurance benefit, and the appeal tribunals in case of unemployment benefit.

**The Ministry of Pensions.**—This department was created by the Ministry of Pensions Act, 1916 (*h*). Its head is the Minister of Pensions whose minor status is shown by his salary of £2,000 a year, assisted by a Permanent Secretary, a Special Grants Committee, a Central Advisory Committee, local Pension Committees, and officials. It is entitled to the aid of the Political Secretaries to the Admiralty, the War Office and Ministry of Health. It is connected with the Pensions Appeals Tribunals under the War Pensions Acts, 1919—21. It took over the functions formerly discharged in relation to pensions by the Army Council, the Admiralty, and the Commissioners of Chelsea Hospital.

**The Ministry of Agriculture and Fisheries.**—The Board of Agriculture, consisting of the Lord President of the Council, the five principal secretaries, the First Lord of the Treasury, the Chancellor of the Exchequer, the Chancellor of the Duchy of Lancaster, and the Secretary for Scotland, was created by the Board of Agriculture Act, 1889 (*i*). To this Board were handed over the duties formerly discharged by a committee of the Privy Council in connection with diseases of animals, and the duties of the former land commissioners in connection with tithe commutation, copyholds, inclosures and allotments, and

(*e*) 9 & 10 Geo. V. c. 50, s. 26 (1).

(*g*) 9 & 10 Geo. V. c. 69; 11 & 12 Geo. V. c. 49.

(*h*) 6 & 7 Geo. V. c. 65.

(*f*) 6 & 7 Geo. V. c. 68.

(*i*) 52 & 53 Vict. c. 30.

the drainage and improvement of land, and it was to collect and disseminate statistics and intelligence and generally to promote the welfare of agriculture. By the Board of Agriculture and Fisheries Act, 1903, the superintendence of fisheries was transferred from the Board of Trade to the Board of Agriculture, and the name of the latter changed to that of the Board of Agriculture and Fisheries. In 1919 the Ministry of Agriculture and Fisheries was substituted for the board (*k*). The Minister is assisted by a Parliamentary secretary (*l*), and by Councils of Agriculture for England and Wales and an Agricultural Advisory Committee for both; a Fertilisers and Feeding-Staffs Committee, a committee on grants to the unemployed, a Livestock Commission with an advisory committee, a Land Fertility Committee, and a White Fish Commission; these last three bodies advise also the department of Agriculture for Scotland and the Home Secretary for Northern Ireland. The Ministry is charged with the settlement of ex-service men, the beet sugar industry, and the regulation of agricultural wages, which are dealt with by the Agricultural Wages Board and local committees. Under modern policy it is required to control the schemes for the revival of agriculture under the Agricultural Marketing Acts of 1931 and 1933, and the Agricultural Land (Utilisation) Act, 1931. This involves the creation of numerous elective boards (for hops, milk, potatoes, bacon, and pigs) on the instance of producers or of the Agricultural Marketing Committee; loans may be made to boards on the advice of an Agricultural Marketing Facilities Committee. There is also a Herring Industry Board, now of elective character (*m*). Provision exists for Consumers' Committees and Committees of Investigation, and for Development Boards for secondary industries in connection with marketing schemes. A Bacon Development scheme was approved in 1935. The position as to wheat, which involves fixing a quota for Dominion and foreign importations, is regulated by the Wheat Act, 1932 (22 & 23 Geo. V. c. 24); there is a Wheat Commission with wide powers (*n*). The Forestry Commission is independent.

The Minister controls the Ordnance Survey and the Royal Botanical Gardens at Kew. He is also *ex officio* a Commissioner of Crown Lands; there are two paid commissioners appointed by sign manual warrant, and they administer the Crown lands—whose revenue now is always over £1,300,000 a year. Such functions as local authorities have as regards agriculture are under his control.

**The Works and Public Buildings Commission.**—The department of the Commissioners of Works and Public Buildings was created by statute in 1851 (*o*) to take over the duties of the former Commissioners of Woods, Forests, and Land Revenues, with regard to parks and public buildings. The board is composed of a First Commissioner, appointed by sign manual warrant, who is a member of the Ministry,

(*k*) 9 & 10 Geo. V. c. 91.

(*l*) 9 Edw. VII. c. 15.

(*m*) Herring Industry Act, 1935 (25 & 26 Geo. V. c. 9). Proposals under it were bitterly attacked in Scotland in April, 1937, and a new Act was passed in 1938.

(*n*) For the limits on its rule making capacity, see *Paul (R. W.), Ltd. v. Wheat Commission*, [1937] A. C. 139.

(*o*) 14 & 15 Vict. c. 42.

and sometimes of the Cabinet, and retires from office with the Government, the principal Secretaries of State, and the President of the Board of Trade. Its duties are discharged by the First Commissioner, assisted by a permanent secretary, and he employs architects, surveyors, engineers, &c., but his staff is under Treasury control. The royal parks are under his charge; new buildings and the care of royal palaces, diplomatic and consular offices, art and science buildings, and ancient monuments rest with him.

**The Board of Education.**—A committee of the Council was appointed in 1839 to attend to matters connected with education, and by 19 & 20 Vict. c. 116, provision was made for a vice-president to sit in Parliament. By the Board of Education Act, 1899 (*p*), the committee of Council was abolished, and the present Board of Education established with a permanent departmental staff. The board consists of a president, the Lord President of the Council (unless he is appointed president), the five principal secretaries, the First Lord of the Treasury, and the Chancellor of the Exchequer (*q*). The duties of the department, which consist in supervising the administration of the various Education Acts, are discharged by the president, with permanent and political secretaries and a permanent staff, and the aid of a Consultative Committee. It also prescribes rules for the employment of children in entertainments.

It is also in control of the Royal College of Art, the Victoria and Albert Museum, and the Bethnal Green Museum, and has functions in connection with the Imperial War Museum, and it administers the Teachers (Superannuation) Act, 1925 (15 & 16 Geo. V. c. 59).

Approved schools for children who are neglected, or in danger of drifting into crime, fall under the Home Office under the Children and Young Persons Act, 1933 (*r*), and medical inspection of children is for arrangement between the Board and Ministry of Health (*s*).

#### *Non-Political Departments.*

The principal of these, which it will be sufficient here to enumerate, with brief notes on those not elsewhere dealt with, are—

The Commissioners of Customs and Excise, and of Inland Revenue, who are appointed by letters patent and are under Treasury control. The chairman of each Board is appointed by sign manual warrant.

The Charity Commissioners (*t*).

(*p*) 62 & 63 Vict. c. 33. A solitary sitting in 1880 of the Committee is recorded: Lord G. Hamilton, *Parl. Remin.* pp. 152 ff.

(*q*) Education Act, 1921 (11 & 12 Geo. V. c. 51), s. 2. Provision is made for a register of teachers and a teachers' registration council (7 Edw. VII. c. 43, s. 16; S. R. & O., 1926 (No. 1588), p. 423).

(*r*) 23 & 24 Geo. V. c. 12; S. R. & O., 1933, No. 774.

(*s*) 11 & 12 Geo. V. c. 51, s. 80.

(*t*) The Charity Commissioners are a permanent board constituted in 1853 to supervise the administration of charities. Their functions are to supervise the expenditure of income by charity trustees, to control the disposition of capital, to prepare schemes for the modification of charitable trusts and to appoint trustees. But their powers over endowments held for purely educational purposes have been transferred to the Board of Education under the Board of Education Act, 1899.

The Ecclesiastical Commissioners, whose number in view of their important functions includes not only high officers of State, but two paid commissioners, and an unpaid commissioner who may sit in Parliament (*u*), but is not, strictly speaking, a minister. Their position and that of the following Commission are discussed later.

The Commissioners of Queen Anne's Bounty, whose powers are extended by the Queen Anne's Bounty (Powers) Measure, 1937.

The Department of Scientific and Industrial Research.

The General Registry of births, marriages, and deaths.

The Friendly Societies Registry.

The Patent Office.

The Public Record Office.

The Public Trustee, created in 1908 to act as executor or trustee under a will or settlement; under the control of the Lord Chancellor.

National Debt Office.

The Public Works Loan Board.

The Mint.

The *London Gazette* Office.

The Stationery Office.

The Civil Service Commission (*x*).

The British Museum.

Imperial War Museum.

The National Gallery.

The National Portrait Gallery.

Wallace Collection.

London Passenger Transport Board.

The Port of London Authority.

Trinity House, a very ancient lighthouse and pilotage authority for the United Kingdom, in charge of various charitable funds; its active Elder Brethren provide assessors for marine causes in the Probate, Divorce, and Admiralty Division of the High Court.

Unemployment Assistance Board.

The British Broadcasting Corporation.

The Racecourse Betting Control Board, created under the Racecourse Betting Act, 1928 (18 & 19 Geo. V. c. 41), to operate totalisators; its members are in part appointed by the Government and the Home Secretary approves its grants towards horse breeding and the promotion of veterinary science.

The Railway Assessment Authority and the Anglo-Scottish Railway Assessment Authority, created under the Railways (Valuation for Rating) Act, 1930 (20 & 21 Geo. V. c. 24).

Of historical interest are the Heralds' College or College of Arms, under the Earl Marshal, with its Kings of Arms, heralds, and pursuivants, whose quaint garb adorns the ceremonial of a royal proclamation; the Court of the Lord Lyon in Scotland which still exercises a needless coercive jurisdiction, and whose energies have

(*u*) 13 & 14 Vict. c. 94, s. 3. The reconstitution of the Ecclesiastical Commissioners and those of Queen Anne's Bounty so that they may consist of the same persons was recommended by the Archbishops in 1933.

(*x*) See p. 195, *post*.

had to be restrained by royal warrant; and the Irish Herald's Office, Dublin. Other bodies, mainly judicial in function, will be described in ch. VI.

### *The Civil Service.*

**Historical Development.**—Early administration in England was extremely defective, but it made for local self reliance; the justices of the peace were largely employed and commanded natural obedience, and their executive officers were largely parochial. From 1587 to 1640 a desperate effort was made by the Privy Council to enforce poor relief, maintenance of tillage, and reduction of vagabondage, but judicial control was insufficient to produce results (y). The central government had a Civil Service (Treasury, Customs, Secretary of State, Post Office, Army and Navy) small, inefficient, paid largely by fees and perquisites. Just before 1800 there were some 300 central officials and 14,000 customs and excise officers and postmasters. The higher offices were often performed by deputy or had only nominal duties; patronage was rampant, and reform was only gradually induced by the efforts of Whig reformers, the loss of the American colonies where nepotism had flourished, the French revolution, and Parliamentary reform. E. Burke's efforts resulted in disfranchisement by legislation over a long period (1782—1868) of customs, excise and postal officials. J. Bentham from 1810 advocated reform, and in 1849, Sir C. Trevelyan, Permanent Secretary to the Treasury, insisted on the overstaffing, inactivity and incompetence, and patronage in the service. Competition had been revived in the universities, and adopted in a modified form for the Indian Civil Service in 1833. It was in 1853 through Lord Macaulay's influence applied completely for India. Contemporaneously an enquiry was held in England (1853—54), resulting in the recognition of the necessity (1) of abolishing patronage; (2) of admitting candidates at prescribed ages and by competitive examination; (3) of distinguishing between intellectual and routine work; and (4) of inventing appropriate examinations. The principle was also adopted that a general education was the sound basis of appointment. The recommendations were in the main accepted in 1855, reinforced by the Superannuation Act, 1859, and laid down systematically by Order in Council of June 4, 1870. Though altered in detail since, the main features of the position have been retained (z). But the expansion of governmental activities has led to some increase

(y) Webb, *The Old Poor Law*, ch. ii.

(z) Royal Commission on the Civil Service, 1929, Report and Minutes of Evidence, especially App. to Part I. There is a collection of Orders in Council up to August 1, 1929; see also that on their conduct August 13, 1935. They are prerogative Orders. Cf. N. E. Mustoe, *The Law and Organisation of the British Civil Service* (1932); *The British Civil Servant* (1937). Who are civil servants is still unsettled in law, the uncertainty affecting those employed in industrial work and like employments and as keepers of offices and their subordinates, porters, charwomen, &c. The annual return of civil staffs does not include industrial staffs, nor branch managers, nor agents, paid by fees, of the Labour Ministry. The Postmaster-General and an engineer are fellow servants of the Crown: *Bainbridge v. Postmaster-General*, [1906] 1 K. B. 178. A workman is entitled to the same immunity from arrestment of wages as any public servant: *Mulvenna v. Admiralty*, [1926] S. C. 842. A police officer as a constable charged with the duty of preserving the peace is a person holding office under the Crown within the meaning of s. 2 (1) of the Official Secrets Act, 1911: *Lewis v. Cattle*, [1938] 2 K. B. 454.

of patronage as opposed to admission by competitive examination, and recruitment by examination into the administrative grade has been affected by the increasing stress put on an oral test which may work adversely against certain classes of candidates.

Control rests, under an Order in Council of July 22, 1920, with the Treasury, which has a special department to consider all staff questions. The Prime Minister has a final decision as to appointments of heads and deputy heads of departments and the principal financial and establishment officers. Each department has an establishment officer; an Under-Secretary at the Treasury presides over a standing committee composed of the officers of the chief departments.

**Classification of the Civil Service.**—The enormous expansion of governmental functions since 1835 has resulted in huge staffs (a) of industrial workers (122,000 in 1929), manipulative workers (178,500), messengers, porters, cleaners (16,500), and other grades (117,500). The last class includes various grades: Administrative, formerly Class I. or Upper Grade (now about 1,200); Executive (16,000); Clerical (60,000); Women Clerical Assistants and Shorthand Typists as General Classes, and Executive, Clerical, Unestablished Clerical, and Typing as Departmental Classes; Assessors, Collectors, &c., of Taxes, Inspectorates, including over 2,000 officers in twenty-eight departments; Professional, Scientific and Technical Staffs; Minor Supervisory and Technical Staffs. Administrative officers have to deal with the formation of policy; executive officers apply to concrete instances the accepted code; clerical officers carry out in ordinary cases the routine work of registering papers, indexing, preparing drafts, and despatching communications. The professional staff includes legal officers; medical officers; architects and surveyors; engineers, civil, mechanical and electrical; and chemists, especially in the Departments of Scientific and Industrial Research, of the Government chemist, and of defence. Valuers and forestry experts are also required. Primary recruitment is entrusted to the Civil Service Commission, first set up in 1855, the members of which hold at pleasure, and it employs various forms of examination. The highest class is recruited on the standard of honours degrees at the universities, and recently more recognition has been given to economic, legal, political, and philosophical as compared with classical and mathematical topics; the age limits are 22—24 in August. The executive class is recruited from young persons (18—19) of a sound higher school education. The clerical class (16—17) are of the school-leaving certificate standard. Professional and technical officers have special examinations, or are recruited on technical qualifications after interview. In certain cases examination can with Treasury and departmental concurrence be dispensed with. But even the Foreign

(a) Periodic returns are made to Parliament; see Cmd. 5815 (1938). All staffs are rapidly increasing in departments concerned with rearmament and social services (health, sickness and unemployment insurance, assistance to unemployed, &c.). The figures, excluding industrial staffs, were on April 1, 1938: revenue departments, 263,385; defence, 22,249; civil departments, 90,857; 275,085 men, 101,406 women, an increase of 20,152 over April 1, 1937.

Office and diplomatic service since 1919 have been opened to competition after selection by interview, and women, if unmarried, are excluded only from that service, the consular, trade commissioner and commercial diplomatic services, and Indian services (*b*); in 1938 the colonial and dominion services were opened experimentally. Promotion is not under the control of the Commission, but on the whole it is managed without much political or other unfairness by the head of each department; in larger departments there are Promotion Boards, who act in part on annual reports rendered by supervisory officers; the staff associations can make representations in case of injustice. Promotion to other classes is comparatively difficult.

**Tenure of Office.**—Civil servants on certification by the Commission are normally subject to probation; if as usual confirmed they hold at pleasure (*durante bene placito*), but in practice they are permanent officials, and are never removed except for misconduct or inefficiency. They are, after ten years' service, on attaining age sixty or earlier in respect of permanent bodily or mental infirmity, entitled to a pension on retirement or superannuation (*c*), which is normally required at age sixty-five and may be imposed at age sixty.

Members of the Civil Service, as of the defence services (*d*), are expected to act loyally to their political heads, to whatever party those heads belong; they are therefore not expected to take any prominent part in politics, and, though there is no restriction as to their exercise of the Parliamentary franchise, with the exception of industrial staffs in defence departments, they are compelled by Order in Council to resign their posts on becoming candidates for seats in Parliament (*e*).

Civil servants are only allowed on conditions to use in publications their official information, to patent inventions, nor may they be directors of companies holding government contracts. They must not use their official position or knowledge for private ends (*f*). Those of the Post Office, Customs, or Inland Revenue are exempt from jury or inquest services, as mayors or sheriffs or other public positions (*g*).

(*b*) Order in Council, July 22, 1920; Regulations, August 23, 1921. On admission to the diplomatic and consular services still refused, see Parl. Pap., Cmd. 5166 (1936). Resignation is compulsory on marriage with rare exceptions. Aliens are excluded and only in certain cases are naturalised persons accepted.

(*c*) See 22 Vict. c. 26; 50 & 51 Vict. c. 67; 55 & 56 Vict. c. 40; 9 Edw. VII. c. 10; 9 & 10 Geo. V. cc. 40, 53, 67; 25 & 26 Geo. V. c. 23. Pensions can be assigned (save as regards customs and inland revenue officers under statute) or taken in execution: *Huggins, In re* (1882), 21 Ch. D. 85; *Willcock v. Terrell* (1873), 3 Ex. D. 323; *Lucas v. Harris* (1886), 18 Q. B. D. 127. They can be awarded to the trustees in bankruptcy, *Lupton, In re, [1912]* 1 K. B. 107; under the Police Pensions Act, 1921: *Garrett, In re [1930]* 2 Ch. 137.

(*d*) Addison, *Four and a Half Years*, vol i., ch. i. Sir H. Wilson's Diaries, i, 114 ff., 154, 200 ff., prove his systematic disloyalty to his political chiefs. Sir John French intrigued against the Government in 1916: Spender, *Lord Oxford*, ii, 141.

(*e*) Order in Council, November 20, 1884; July 25, 1927; see Parl. Pap., Cmd. 2408 (1925). Departmental orders sometimes prohibit service on municipal and similar bodies, if inconsistent with duties.

(*f*) Mr. Gregory's case: Report of Board of Inquiry, 1928, s. 56; Sir C. Bullock's case (1936), Parl. Pap. Cmd. 5254, 5255.

(*g*) 39 & 40 Vict. c. 36, s. 9; 53 & 54 Vict. c. 21, s. 8; 8 & 9 Geo. V. c. 40, ss. 231, 232; *Van Druten, Ex parte* (1914), 30 T. L. R. 198.

No contractual relation exists between the head of the department and the members of the permanent staff—they are all alike servants of the Crown; and therefore the Secretary-at-War was held not liable in an action for the recovery of pay by a clerk in the War Office (*h*). Officers are civilly liable for torts as already mentioned (*i*), and criminally for stealing Crown property (*k*), sale of office (*l*), extortion (*m*), or oppression (*n*), and breach of trust, fraud or imposition in a matter affecting the public is a misdemeanour, as neglect of legal duty may be (*o*). They are subject to the Official Secrets Acts of 1911 and 1920 (*p*), to the Prevention of Corruption Acts, 1906 and 1916 (*q*), and the Honours (Prevention of Abuses) Act, 1925. The postal service is subject to special penalties, *e.g.*, in respect of disclosure of telegrams (*r*). They enjoy the protection of the Public Authorities Protection Act, 1893, and may not be sued for libel in official reports to a superior (*s*). Officers are not liable for contracts for the Crown, though they must plead if such a suit is brought (*t*). An action for money had and received does not lie against a civil servant if in doing so he acted within his authority (*u*).

Since the disloyalty shown by certain civil servants during the general strike of 1926, it has been laid down by Statute (*x*) that established civil servants may not be members or representatives of organisations whose primary object is to influence the remuneration, or conditions of employment of their members, unless their membership is confined to persons employed by the Crown, and they are not affiliated to organisations of different composition, nor have political objects, nor are associated with a political party. Certificates for fitness for membership are applied for to the Chief Registrar of Friendly Societies and granted by the Treasury.

(*h*) *Gidley v. Lord Palmerston* (1822), 3 Br. & B. 275. In such a case it is sometimes said that the proper remedy is by petition of right. But it is clear that there is no contractual relation between the Crown and its servants, including no doubt civil servants: cf. *Leaman v. R.*, [1920] 3 K. B. 663; *Kynaston v. Att.-Gen.* (1933), 49 T. L. R. 300. This is laid down as to pensions in *Nixon v. Att.-Gen.*, [1931] A. C. 184, and is not on this head contradicted by *Reilly v. R.*, [1934] A. C. 176 (Canadian Appeal). Pay cannot be assigned or taken in execution: *Flarty v. Odium* (1790), 3 T. R. 681; *Apthorpe v. Apthorpe* (1887), 12 P. D. 192; but a part of pay may be allowed to be taken in bankruptcy: *Ward, In re*, [1897] 1 Q. B. 266.

(*i*) See p. 35, *ante*.

(*k*) 6 & 7 Geo. V. c. 50, s. 17 (2); 15 & 16 Geo. V. c. 86, s. 24, Sch. II.

(*l*) 49 Geo. III. c. 126, ss. 4, 5.

(*m*) *Lee v. Dangar, Grant & Co.*, [1892] 2 Q. B. 337.

(*n*) *R. v. Williams* (1762), 3 Burr. 1317.

(*o*) *R. v. Baxter* (1851), 5 Cox, C. C. 302; *R. v. Pinney* (1832), 3 St. Tr. (N. S.) 11, 510.

(*p*) Cf. *R. v. Simington*, [1921] 1 K. B. 451; *R. v. Crisp and Homewood* (1919), 83 J. P. 121.

(*q*) *R. v. Evans* (1923), 17 Cr. App. R. 121. It is criminal for an officer whose position demands impartiality to conspire with others that he shall receive a bribe: *R. v. Whitaker*, [1914] 3 K. B. 1283.

(*r*) Post Office Act, 1908, ss. 55–58, 69, 89; Telegraph Act, 1868, s. 20.

(*s*) *M. Isaacs & Sons v. Cook*, [1925] 2 K. B. 391.

(*t*) *Macbeath v. Haldimand* (1786), 1 T. R. 172; *Felkin v. Herbert* (1861), 30 L. J. Ch. 604.

(*u*) *Whitbread v. Brooksbank* (1774), 1 Cowp. 66; *Irving v. Wilson* (1791), 4 T. R. 485.

(*x*) 17 & 18 Geo. V. c. 22, s. 5; S. R. & O., 1927 (No. 800), p. 131.

**Advantages of the English System.**—The advantages of the system which thus prevails in the principal Government departments in England of combining a changing Parliamentary head with a non-changing permanent staff may be clearly seen by a comparison with the systems adopted in foreign countries.

In America, in the Federal Government, the principle of changing the Government officials with every change of Government is not confined to the heads of departments alone, but extended at one time to most minor situations in the Government service, and still extends to a fair number (*y*).

Insecurity of tenure leads to the holders of office devoting their time not to the business of their office but to political organisation in order to secure the re-election of the Government which they serve. They are deprived of incentive to make themselves experts, and, even if they become expert, at the next Presidential election they may be replaced by persons quite inexperienced in any save political methods. Thus a new minister has not the advantage of an experienced staff to preserve continuity. On the other hand, it is clearly necessary for officials to be rescued from the dangers of overbearing officialdom, from excessive rigidity, and from inter-departmental contests on matters of *amour-propre* and formal procedure. This service is performed by the Minister (*z*) who in theory at least represents the outside world and who, at any rate, protects the civil servants from criticism, for it is most improper to attack any civil servant as opposed to the Minister (*a*). It is the part of the civil servant to preserve continuity in work, to prevent abrupt changes, to place clearly before the Minister all relevant facts and views on matters of policy, and, when policy is to be altered, to secure that it shall be introduced without unnecessary conflict. It has been authoritatively laid down (*b*) that a civil servant should make quite clear to his chief any objections as to policy, and should not resign instead of speaking out, or repress views to please ministers. A minister in return has no right to resent the expression of conflicting views. Loyalty is reciprocal and a minister should make full use of his staff and his private secretaries, though he may properly consult any outside opinion; Mr. Lloyd George's errors were often due to his failure to make proper use of his official advisers.

**The Whitley Council.**—Efforts of civil servants to secure control of their own conditions of service have not wholly succeeded. There has, however, been conceded the application of the Whitley Council system. There is a National Council for the administrative and legal departments as a whole, consisting of fifty-four members, half representing equally official and staff sides, the chairman being the Second

(*y*) Finer, *Modern Government*, ii, 1331—1338. So also in Canada; see Dawson, *Civil Service of Canada*.

(*z*) Bagehot, *Eng. Const.*, p. 201.

(*a*) Sir R. Vansittart was rather improperly attacked in April, 1933, in respect of his despatch on the Soviet trial of certain engineers: Cmd. 4286, 4290. For the confusion as to the position of Sir A. MacDonnell and Mr. Wyndham, cf. Dugdale, *Arthur James Balfour*, i, 415 ff.

(*b*) Dardanelles Commission, 1st Report, para. 19 (Cd. 8490 (1917)).

Secretary of the Treasury (c). The staff side is appointed by civil service groups and associations. It may consider questions of principle as to promotion and discipline, but not as regards officers on scales of salary above £700 a year. There are Departmental Councils, which are bound to refer general questions to the National Council; their work is confined to non-industrial staffs with incomes under £500 a year; they can discuss issues of alleged breach of principles of promotion, or unfair disciplinary action; there are local committees in the sub-departments; there are Industrial Councils for the industrial staffs. Their functions extend to all issues of co-operation to secure smooth working; the Minister or the Government retains final power. A Civil Service Conciliation and Arbitration Board was set up in 1917, and after intermission (1922—25) resumed in 1925 as a form of the Industrial Court; it is presided over by the President of the Industrial Court, one representative each from panels selected by the Minister of Labour, representing (1) the Chancellor of the Exchequer, and (2) the staff side; they may not be civil servants or officials of associations. It deals with claims of classes of staff on salaries up to £700 a year, or by consent with other classes. The Treasury, however, retains final control; clearly any other position would be intolerable, for otherwise the Crown's sole right to propose expenditure to the Commons would be undermined. It regularly, however, accepts the rulings of the Court. There is, however, clearly a growing danger of excessive cost of the service through its power of pressure and Parliamentary agitation. Its higher ranks are now relatively highly paid (d), resulting in difficulty in refusing claims by the subordinate officers. Exploitation of the State by the civil service is becoming a danger, especially as the growing number of such servants increases their political power steadily, while their ability enables them effectively to assert their claims, and to prevent full weight being given to the facts of (1) security of tenure, and (2) sickness pay and pension rights. The grant of honorary distinctions, on a regular scale, formerly regarded as a consideration to be set against low rates of pay, is now held to require salaries commensurate to the titular distinction involved.

(c) Macrae-Gibson, The Whitley System in the Civil Service.

(d) £23,000 a year for heads of departments (£23,500 for the Treasury). Yet the restrictions on enterprise result in a certain loss of abler men.

## CHAPTER IV.

## PREROGATIVE AND STATUTORY EXECUTIVE POWERS.

**The Combination of Powers.**—The executive exercises not only very extensive powers of executive character, but has considerable legislative and judicial authority. The separation of powers has never existed in any clear form in England in the sense that executive, legislative and judicial functions have ever been exercised by distinct authorities to any exclusion of combination of functions. The King, as the result of the Norman Conquest which vitally altered the rules of Anglo-Saxon times, originally combined all three and exercised them in Council. Gradually legislation and taxation were assigned to Parliament, and the King ceased to control his judges, as he had done long after he ceased to sit as judge in his Council. Montesquieu's famous doctrine of the separation of powers reflects a misapprehension of a special aspect of the English system, though it has had important effects both in the United States and France (*a*). With the final disappearance of Crown domination, the executive, now representing the people as constituting the electorate, has assumed with sanction of Parliament large powers of a legislative and judicial or semi-judicial character.

The history of the prerogative is thus a steady narrowing of its ambit and the substitution in lieu of statutory authority, above all in the fields of legislative and judicial power. Otherwise the functions of the executive remain as from early days. It secures defence against internal disorder and foreign aggression, controls war and peace, conducts relations with foreign powers and the Dominions, supervises colonies and other dependencies, executes the laws and promotes social welfare, exercises the prerogative of pardon, and initiates legislation.

*The Royal Prerogative.*

**Definition and Sources.**—The Crown's prerogative may be defined, in Blackstone's words with a slight modification, as being that "special pre-eminence which the king hath over and above all other persons, by virtue of the common law, but out of its ordinary course, in right of his royal dignity" (*b*). The prerogative, says Dicey, "appears to be both historically and as a matter of actual fact nothing else than the residue of discretionary or arbitrary authority which

(*a*) L'Esprit des Lois, bk. xi, ch. vi (1748). Cf. Finer, *Modern Government*, pt. iii, ch. vi; Dicey, *Law of Const.*, pp. 333 ff.

(*b*) The words "by virtue of the common law" are added to Blackstone's definition (1 Bl. Com., 14th ed., 239), because it is clear that the prerogative forms part of the common law, and the Courts have frequently adjudicated upon its extent.

at any given time is legally left in the hands of the Crown." And this latter definition has been recently judicially confirmed by the House of Lords (c). The prerogative as thus defined can be logically traced to three sources: (1) the old system of tribal chieftaincy, which gave rise to the executive, legislative and judicial powers of the Crown; (2) the old system of feudal chieftaincy, which gave rise to such rights as escheats, treasure trove, the custody of infants and idiots, and from which the doctrines of allegiance and treason sprang; (3) the various legal maxims evolved by lawyers, e.g., "the King never dies," "the King can do no wrong," or "*nullum tempus occurrit regi*." It is perhaps historically more accurate to say, as Professor Maitland does, that the King's prerogative consists in the right of a feudal lord paramount in the lands of his subjects, all his powers being conferred on him in order to protect his rights as land-owner in all the lands of his kingdom. By the passage of time and the rise of the power of the electorate all this is vitally changed. The prerogative of the King is the privilege of his subjects; that is, the King must exercise his prerogative not for his own benefit but for the protection of his subjects in accordance with the advice of his constitutional legal advisers (d). The King in Council is the Executive; the King in Parliament is the Legislature; the King in his Courts administers justice; and thus the Crown binds together every department of the State.

**Evolution of the Prerogative.**—The present state of the prerogative is the result of a long and bitter struggle between the Crown and Parliament to fix its limits, whose course is marked by the four great statutes, set out in Part I., Chap. I., viz., Magna Carta, 1215; the Petition of Right, 1628; the Bill of Rights, 1689, and the Act of Settlement, 1701. With the last of these the struggle was practically ended, and the limits of the prerogative were fixed in accordance with the popular will.

In theory each statute marks a mere restoration with the assent of the Crown of the true extent of the prerogative, and a condemnation of the violation of law, and it is at least true that the Stuarts under the influence of the doctrine of divine right maintained a theory of prerogative, which divorced it from the common law and implied a definite departure from the organic conception of monarchy, still found under the Tudors, with its inheritance of the feudal idea of a contract between the King and his people.

The principal topics which were the source of strife between the Crown and Parliament were (1) arbitrary imprisonment; (2) arbitrary taxation; (3) the maintenance of a standing army and the issuing of

(c) *Att.-Gen. v. De Keyser's Royal Hotel*, [1920] A. C. 508. See also *British Coal Corporation v. R.*, [1935] A. C. 500; *Moore v. Att.-Gen. for Irish Free State*, [1935] A. C. 484. Powers specially conferred by statute are not prerogative, though powers do not cease to be prerogative because declared by statute, e.g., *Prerogativa Regis* (17 Edw. II. stat. 2). Nevertheless inaccurate use of the term is not rare, even Lord Haldane, extrajudicially, speaking of the power to declare the royal style given by the Royal and Parliamentary Titles Act, 1927 (17 & 18 Geo. V. c. 4), as prerogative.

(d) Maitland's *Collected Papers*, ii, 182.

commissions of martial law in time of peace; (4) the granting of monopolies and exclusive trading licences; (5) the suspension of and dispensing with Acts of Parliament; (6) the control of the judiciary; and (7) the right of independent legislation.

**Arbitrary Imprisonment.**—This, or indeed arbitrary punishment of any kind, was a direct infringement of the terms of Magna Carta, imposing the rule of law, but the value of the Statute depended on means of enforcement and the doctrine that the Privy Council could commit by the special command of the King, which was admitted by the judges in 1591 (*e*), was applied successfully in *Darnel's Case* (*f*) to prevent the release on *habeas corpus* of knights illegally imprisoned for refusal to pay their share of a forced loan. So the Petition of Right, 1628, again affirmed that no freeman should be imprisoned or detained contrary to the law of the land, and prohibited the issue of commissions of martial law in time of peace. But in 1629 the King's Bench refused to order the production of the six members imprisoned by royal warrant (*g*) and the jurisdictions of the King in Council, exercised by the Star Chamber and the Court of High Commission, still remained as standing grievances, and were justly held in odium through the increasingly arbitrary nature of their proceedings. The Star Chamber and the Court of High Commission fell in 1641 (*h*). The greatest safeguard, however, for the liberty of the subject at the present day is to be found in the Habeas Corpus Acts (*i*).

**Arbitrary Taxation.**—Arbitrary taxation by means of proclamation, letters patent, or writs under the Great Seal was frequently resorted to by the Tudors and Stuarts as opposed to the Lancastrians, in order to meet the inroads made upon the Exchequer by expensive wars, and often by their own extravagance, though no doubt the Commons granted money reluctantly, and, in many cases, too sparingly to meet the national requirements, as was perhaps only natural at a time when they had little or no voice in its expenditure. The judiciary, subject to tenure of office at the royal pleasure, naturally favoured the prerogative, and Parliament condoned the royal action at times, as in 1495, when it made compulsory payment of a benevolence, and in 1529 and 1544, when it relieved the King of the duty to repay loans (*k*). James I.'s debts drove him to convert into a source of revenue the right to enact impositions on foreign trade for the protection of local interests. In *Bates' Case* an information having been laid against John Bates for refusing to pay a custom duty of five shillings per cwt. on currants, this tax having been imposed by letters patent, it was pleaded on behalf of the defendant that the duty was illegal. The four Barons of the Exchequer decided

(*e*) Anderson's Rep., 298.

(*f*) (1627), 3 St. Tr. 1.

(*g*) *Six Members' Case*, 3 St. Tr. 235.

(*h*) 16 Car. I. cc. 10, 11. The Court of Commissioners for Ecclesiastical Causes, wrongfully established by James II., was abolished by the Bill of Rights, 1689.

(*i*) 31 Car. II. c. 2; 56 Geo. III. c. 100, as to which, see p. 435, *post*.

(*k*) 11 Hen. VII. c. 10; 21 Hen. VIII. c. 24; 35 Hen. VIII. c. 12.

unanimously in favour of the Crown (l). The grounds relied on were in part merely that the Crown had full control of foreign relations and trade, could close the ports and control the entry of currency, and so could shut off imports, or regulate *sub modo*. But a distinction was drawn also between the absolute and ordinary power of the Crown, the latter subject to common law, the former variable in the interest of the *salus populi* (m). It was also asserted by the Court that the Crown could impose rates not only on imported goods, but also on goods produced and sold in the realm. The Book of Rates issued in 1608 by the King excited more annoyance on this score than the judgment itself. This decision led to the Petition of Grievances, 1610, which resulted in a remission of the taxes on alehouses and sea coal, but not in the concession of the principle involved. The Petition of Right followed in 1628, by which Charles I. pledged the Crown not to resort to taxation otherwise than by Act of Parliament; this pledge, however, he studiously disregarded; in 1634 in need of a navy, Charles I. issued writs for ship money to seaports, in 1635 he extended them to inland towns, both then and in 1636 obtaining the opinion of the judges in favour of the legality of the course, and in 1637, *Hampden's Case* (known as the Case of Ship Money) was given in favour of the Crown by seven judges out of twelve (n). The essential argument was that in necessity the King must have the power to raise funds to secure the realm, for, while *quod omnes tangit per omnes debet supportari*, there may be no time to summon a Parliament and he must act alone. If reliance is placed on mediæval statutes, the King has a prerogative to defend the realm, and a statute to deprive him of it is void. Berkeley, J., went further: "I never read nor heard, that Lex was Rex; but it is common and most true that Rex is Lex, for he is 'lex loquens,' a living, a speaking, an acting law." In consequence of this decision the Long Parliament passed an Act declaring all the proceedings in *Hampden's Case* "contrary to the laws and statutes of the realm, the rights of property, the liberty of the subject, and the Petition of Right," and vacated and cancelled the judgment (o).

The attempts of the Crown to impose taxation without the consent of Parliament came to an end with the Revolution of 1688, and the Bill of Rights, 1689, which gave the Crown to William and Mary,

(l) (1606—10), 2 St. Tr. 371.

(m) *Ib.* 389, *per* Fleming, C.B. Coke and Popham, C.JJ., seem, on consultation, merely to have conceded a right to control trade, not to raise revenue. See Tanner, Const. Doc. of James I., pp. 243—268, 336—345. Hakewill's argument in 1610 rested on the fixity of demands legal by common law, Whitelocke's on Parliamentary sovereignty as opposed to that of the King out of Parliament, and on the danger of absolutism if the King were independent of Parliamentary grants.

(n) (1637), 3 St. Tr. 825. Maitland (Const. Hist., pp. 297—301) justly insists that the judges who decided for the King were on the whole not prepared to assert his complete sovereignty, Finch admitting that Parliament could take away "flowers and ornaments of the Crown" (p. 1235). But he said: "No Act of Parliament can bar a King of his regality . . . Acts of Parliament to take away his royal power in the defence of his kingdom are void." The sovereignty of the King in Parliament is already asserted by Sir Thomas Smith, Secretary of State, in his *De Rep. Anglorum*, bk. ii, c. 1, written in 1565, and published in 1583.

(o) 16 Car. I. c. 14.

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279, 439

at the same time declared that the levying of money for the use of the Crown without grant of Parliament is illegal. The rule is still of essential value and has been adduced to counter the efforts of the Scottish Milk Marketing Board to impose illegal levies on producers (*p*).

**The Maintenance of a Standing Army.**—As part of the process of raising money Charles I. used the device of impressment into the army (*q*) or navy of those who refused to pay enforced loans, and sent troops, embodied militia, to be quartered on the people, and commissions of martial law were issued. The Petition of Right (1628) therefore struck at the maintenance of the standing army by prohibiting in time of peace the billeting of soldiers or sailors on private houses, and the issue of commissions of martial law, by which alone the army could be properly disciplined. The Restoration restored the militia and all other forces by sea and land to the sole government of the King (*r*), and both Charles II. and James II. with the consent of Parliament kept up a permanent body of guards.

The Bill of Rights declared the maintenance of a standing army and the issue of commissions of martial law in time of peace illegal, and since that date the regular standing army—and since its creation the air force—has not in theory been a standing army, but has been maintained on a legal footing by means of annual Acts.

**Monopolies and Exclusive Trading Licences.**—The Tudors and Stuarts claimed and frequently exercised the prerogative of granting monopolies for the exclusive right of manufacturing, selling, buying, or using commodities, whether they were the invention of the grantee or not. Elizabeth in 1571 effectively repressed criticism by the Council's harsh treatment of Sir R. Bell, and in 1597 begged the Commons not to take away her prerogative, "the principal and head pearl in her Crown," but in 1601 she promised the revocation of all patents and the cessation of such grants (*s*). This right of granting monopolies indiscriminately was not admitted at the common law, though the grant of the sole use to a person for a reasonable time of any new art invented by him was held to be within the Crown's prerogative. The great authority for this common law right of the Crown is the case of *Darcy v. Allein* (*t*) (44 Eliz. 1602), commonly called "the Case of Monopolies"; there the grant of a patent for the exclusive making and importing of playing-cards was held to be a monopoly, and therefore void as contrary to the common and statute law and to public policy; the right of the Crown to grant a patent for new inventions was, however, admitted by the judges. This view was maintained by the Statute of Monopolies (21 Jac. I. c. 3), which, while prohibiting the grant of monopolies generally, expressly excepted grants already made for a period not exceeding twenty-one years or to be made for a period not exceeding fourteen

(*p*) *Ferrier v. Scottish Milk Marketing Board*, [1937] A. C. 126.

(*q*) Cf. *Reed's Case* in 1544; Lodge, *Illustrations of British History*, i, 100.

(*r*) 13 Car. II. c. 6.

(*s*) Tanner, *Tudor Const. Doc.*, pp. 573—577; D'Ewes' Journal, pp. 159, 547.

(*t*) 11 Co. Rep. 84 (d).

years, of a patent for "the sole working or making of any manner of new manufactures within this realm to the true and first inventor or inventors of such manufacturers" (u), and this language has been impliedly incorporated into the Patents and Designs Act, 1907 (x), by which the grant of letters patent is now regulated, the duration of the patent being limited to the term of fourteen years, subject to extension in certain cases.

The Statute of Monopolies expressly excepted the rights of corporations, and of any companies or societies, from the operation of the Act (y), and in 1683 it was held in the case of *East India Company v. Sandys* (z), known as "the Great Case of Monopolies," that a grant to the Company of the sole right of trading to the East Indies was good. The arguments adduced included (1) the sole control by the Crown of foreign relations and accordingly of foreign commerce; (2) the special rule that with infidels a Christian King is always at war and any trade relations rest on his sanction. In 1693 a new charter was granted to the Company, and, in consequence of the detention by the order of the Company of the *Redbridge* in the Thames on an allegation of intention to violate the monopoly, the House of Commons passed a resolution to the effect that "all the subjects of England have equal right to trade to the East Indies unless prohibited by Act of Parliament" (a). Since that date the creation of such exclusive rights of trading has been clearly recognised as illegal, save under statute as in the case of the new East India Company set up in 1698.

**The Suspending and Dispensing Powers.**—These powers seem, in their exercise by Henry III., to have been derived from the papal practice of issuing bulls *non obstante statuto*, any law to the contrary notwithstanding. Under Richard II. we find Parliamentary agreement to the exercise of the power to dispense with the Statute of Provisors (b), and under Henry IV. and Henry V. the practice appears. Under Henry VII. the doctrine is accepted that the King may not dispense with *malum in se*, though he can pardon; but a *malum prohibitum* can be the object of dispensation, and so a law forbidding dispensation with the rule that a sheriff may only hold office for a year can be dispensed with (c). The Stuarts, as usual, by unwise use both of dispensation and general suspension, evoked trouble, but the Courts, as usual subservient, upheld their view. The House of Commons had a very different opinion, and used the power of the purse in March, 1673, to compel Charles II. to cancel his

(u) 21 Jac. I. c. 3, ss. 5, 6.

(x) 7 Edw. VII. c. 29, ss. 17, 18. The term "patent" thus reflects a time when the privileges were granted even in 1852 by letters patent under the Great Seal: now they issue under the seal of the Patent Office.

(y) 21 Jac. I. c. 3, s. 9.

(z) (1683—1685), 10 St. Tr. 371.

(a) Parl. Hist., v, 828; Keith, Constitutional History of India, 1600—1935, p. 14.

(b) Rot. Parl., iii, 285 (1391). Cf. iii, 301; iv, 13.

(c) 23 Hen. VI. c. 7; 12 Co. Rep. 18; Holdsworth, Hist., vi, 217 ff.; Chrimes, English Const. Ideas in the Fifteenth Century, pp. 281—283.

declaration of indulgence of 1672, claiming that penal statutes in ecclesiastical matters could only be suspended by Act of Parliament (*d*).

In *Thomas v. Sorrell* (*e*) the plaintiff, as common informer, claimed from the defendant a penalty for selling wine without a licence contrary to statute. The dispensation to the Vintners' Company of James I. having been pleaded by the defendant, it was held that the King cannot dispense with any general penal law made for the common good or that of a third party, but that he could dispense with a penal law the breach of which would only affect the King himself, and would not deprive any subject of any right of action.

In *Godden v. Hales* (*f*), which was a similar action to recover a penalty from Sir Edward Hales, holding a military office, for not having taken the oaths of supremacy and allegiance imposed by the Test Act, for which he had been indicted and convicted, it was held that the plea of dispensation was good, it being the King's "inseparable prerogative to dispense with penal laws in particular cases and upon particular necessary reasons," of which the King himself is sole judge.

In the *Seven Bishops' Case* (1688) (*g*) the bishops were charged with seditious libel for having petitioned the King against a declaration of indulgence "founded on such a dispensing power as hath often been declared illegal in Parliament." Two judges were in favour of conviction, and two against it, but the jury, which very unusually was allowed to decide on motive, after twelve hours' discussion, acquitted. Powell, J., had warned them: "It amounts to an abrogation and utter repeal of all the laws . . . If this be once allowed of, there will need no parliament: all the legislature will be in the King, which is a thing worth considering, and I leave the issue to God and your consciences" (*h*). The Bill of Rights condemns outright the pretended power of suspending laws or their execution, declares illegal the dispensing power "as it hath been assumed and exercised of late," and expressly forbids dispensation, save under statutory power, in future (*i*). The prerogative power to pardon, of course, remains, for a pardon differs vitally from dispensation. As late as March 22, 1937, Bennett, J., suggested that the power claimed by the Commissioners of Income Tax to compound income tax claims was a violation of the Bill of Rights (*k*).

**The Judiciary.**—The subservience of the judges was an essential feature of the Stuart attempt to assert the prerogative. Though James I. was dissuaded by Coke and all the judges, contrary to the arguments of Archbishop Bancroft, from acting as judge (*l*), he asserted

(*d*) Parl. Hist., iv, 526, 551; Parliament passed the Test Act, 25 Car. II. c. 2, in retaliation: Tanner, *English Const. Conflicts of the Seventeenth Century*, pp. 230, 235.

(*e*) (1674), Vaugh. 330.

(*f*) (1686), 11 St. Tr. 1166.

(*g*) (1688), 12 St. Tr. 183.

(*h*) *Ib.* 427.

(*i*) 1 Will. & Mar. sess. 2, c. 2.

(*k*) See *The Times*, March 23, 1937; *The Income-Tax Payer*, xiv, 73. But see *Income Tax Act, 1918*, s. 22 (1).

(*l*) *Prohibitions del Roy* (1607), 12 Co. Rep. 63. For his views of the duty of judges to be subservient, see Tanner, *Const. Doc. of James I.*, pp. 173—179; Bacon bade them be "lions under the throne" (*Works*, vi, 201).

his claim to forbid proceedings without reference to the Crown (*m*), and the dismissal of Coke warned judges to be wary. The Restoration saw the judges more and more pliable instruments, and through the inexcusable refusal of William III. to assent to a bill to secure their independence (*n*), it was not until the Act of Settlement, 1701, that judicial tenure was declared to be during good behaviour. James I. likewise intimidated the bar when it showed criticism of illegal action (*o*).

### *The Present State of the Prerogative.*

**Legal Limitations of the Prerogative.**—The result of the Petition of Right, 1628, the Bill of Rights, 1689, and the Act of Settlement, 1701, was thus a vast curtailment of the unbridled prerogative claimed by the Stuarts under the theory of divine right. The King could no longer impose taxes or legislate independently of Parliament, and he was prevented from using force in carrying out unconstitutional measures, since the existence of a standing army depended upon Parliament. He could no longer erect Courts, such as the Star Chamber or Court of High Commission, which would enforce his proclamations; nor could he create a subservient judiciary who would enable him to disregard statutes with impunity. In addition to these curtailments the Act of Settlement provided that a pardon under the Great Seal should not be pleadable in defence to an impeachment by the Commons; though it could still pardon after condemnation, the Crown was thus debarred from shielding its ministers from facing the consequences of illegal acts. Further, the right to petition for redress of grievances was established by the Bill of Rights. It was rendered clear that the Crown could not carry on the government of the country save with the good will of Parliament, and led to the modern doctrine of responsible government, and the exercise in the interest of the people of the prerogative.

**Constitutional Restraints upon Improper Exercise.**—From what has been already said it will be seen that the principal constitutional safeguards against an undue exercise of the prerogative are: (1) The fact that the ministers of the Crown, or public officials, must have recourse to the ordinary legal tribunals to enforce obedience to their commands, and that is so doing the plea of the King's commands (*Danby's Case* (*p*)), or State necessity (*Entick v. Carrington* (1765) (*q*)), will not justify illegal acts, whilst the existence of any alleged prerogative may be judicially inquired into and determined. (2) Under the doctrine of ministerial responsibility, ministers may be punished by Parliament for improper advice given to the Crown, by loss of office, censure, or, in theory, impeachment. (3) The liability of all

(*m*) Gardiner, *Hist. Eng.*, iii, 7 ff. Charles I. succeeded in precluding Sir J. Walter, C.B., from acting, though his patent was during good behaviour, and Charles II. acted similarly as regards Archer, J.; Mollwain, *The American Revolution*, p. 178.

(*n*) Hallam, *Const. Hist.*, iii, 192. His judges had, however, commissions *quamdiu se bene gesserint*. For the gross injustice of the Stuart judiciary, see ii, 426 ff.

(*o*) Cases of Fuller and Whitelocke, Gardiner, ii, 36, 188.

(*p*) *Danby's (Earl) Case* (1679), 11 St. Tr. 599.

(*q*) *Entick v. Carrington* (1765), 19 St. Tr. 1030.

servants of the Crown in their individual capacity, either civilly or criminally, for all tortious or criminal acts. (4) The right of petitioning the Crown and Parliament. (5) The necessity for obtaining supplies, and passing the various Acts expiring annually, obliges the Crown to summon Parliament regularly, and to observe the conventional laws of the constitution. (6) The electorate is now, with the aid of the Press, reasonably vigilant to attack injustice, though indifferent to illegalities not patent to it, such as the invalid changes in the Coronation Oath of May 12, 1937.

**Supersession by Statute.**—When a statute is passed empowering the Crown to do a certain thing which it might heretofore have done by virtue of its prerogative, the prerogative is abridged by the statute, and the Crown can only do that thing in accordance with the provisions of the statute, and its prerogative to do that thing is in abeyance. Thus the wide power of delegating functions in illness exercised by the King in 1928 has been by the Regency Act, 1937 (s. 6), restricted so that delegation is confined to the royal personages, domiciled in some part of the United Kingdom, therein specified. The power of the Crown in time of war to take possession of the subject's property for defence purposes is not doubtful (*r*). But it is quite certain that since the Defence Act, 1842, land cannot be occupied for administrative purposes by the Crown even in war save on payment of the compensation due under the Act, and the Defence of the Realm Act, 1914, does not confer any power contrary to this rule (*s*). So where an Act was passed which was inconsistent with the Crown's right to seize and forfeit the private property of an enemy it was held that the Act showed an intention by the Crown to abandon, at least temporarily, the common law right (*t*).

**Present State as Modified by Statute.**—At the present day, then, the King, *i.e.*, the Crown on the advice of the Ministry, exercises a very wide range of powers by prerogative or statute. (1) The King is nominally the supreme executive power, and many executive acts are done in his name, while others are assigned to his Ministers. (2) He summons, dissolves, and prorogues Parliament, and assents to legislation. (3) He is the supreme head of the Church, appoints bishops, authorises convocations to convene and pass canons, and permits promulgation; his assent is necessary for Church Measures approved by Parliament. (4) He is the source of all jurisdictions, appoints judges, and exercises the prerogative of mercy. (5) He is

(*r*) *Saltpetre Case* (1606), 12 Co. Rep. 12; *Petition of Right, In re*, [1915] 3 K. B. 649, but compromised on appeal (1916), 32 T. L. R. 699.

(*s*) *Att.-Gen. v. De Keyser's Royal Hotel*, [1920] A. C. 508. The exact position of the prerogative in such conditions is not perfectly clear in theory: cf. the *dicta* at pp. 528, 539, 554, 562, 575. Whether a prerogative can be lost by disuse is disputed; if it is merely not used because it is not required, it seems open to revival in case of appropriate circumstances supervening, *e.g.*, requisitioning of shipping in war even in foreign ports: Holdsworth, L. Q. R., xxxv, 12—42; *contra, Russian Bank of Foreign Trade v. Excess Insurance Co.*, [1919] 1 K. B. 33. The King may disable himself by declaration from the full exercise of international law rights: *The Zamora*, [1916] 2 A. C. 77.

(*t*) *Ferdinand, Ex-Tsar of Bulgaria, In re*, [1921] 1 Ch. 107.

the head of the defence forces, appoints officers, and confirms sentences of courts-martial. (6) He controls foreign relations, treaties, war, neutrality, and peace. (7) He is the link of connection with the Dominions, and exercises very wide powers in respect of the other parts of the Empire. (8) He has important commercial and financial prerogatives which have been very widely superseded or extended by legislation, *e.g.*, as to ports and harbours, coinage, weights and measures. (9) The preservation of security is peculiarly his concern and he may have special authority in that regard. (10) He is the fountain of honour. (11) He is *parens patriæ*. (12) He has many legal privileges by reason of his regal dignity and pre-eminence and enjoys exemption from most statutes. (13) He has important property rights, which sometimes are counted as *minora regalia* as contrasted with the *majora regalia* of kingly state and governmental powers. (14) He has the power to charter corporations.

These functions have in part already been discussed, or will be dealt with elsewhere in their context; here it is sufficient to notice certain minor powers and privileges among those above set out. The regal dignity demands immortality: *the King never dies* (*u*), and by statute this has been carried to secure that all government servants and business continue unaffected by the demise of the Crown, *i.e.*, the transfer (*demissio*) to his successor (*x*). It demands perfection: the Sovereign cannot mean to do wrong, hence an illegal grant is because the Sovereign is deceived in his grant (*y*).

From the maxim that *the King can do no wrong* flows the result that no action can be brought against him in criminal suits or in civil causes arising out of tort; in civil cases arising out of contract the subject must proceed by the special method of Petition of Right, which is granted as of grace and not upon compulsion, the procedure being now principally governed by the Petitions of Right Act, 1860 (*z*). Perfection involves also the maxim *nullum tempus occurrit regi*, since no negligence or *laches* can be attributed to the Crown; but in suits relating to the recovery of land (except liberties and franchises which may be prescribed for at common law) the Crown is barred under the Nullum Tempus Act, 1769, by the lapse of sixty years (*a*), and in informations for usurping corporate offices or franchises by the lapse of six years (*b*).

The Crown again is not bound by statute unless by express words or necessary implication, though the rule is sometimes stated in favour of it being bound by statutes for preservation of public right, relief of the poor, advancement of learning, religion and justice, &c. (*c*).

(*u*) *Viscount Canterbury v. Att.-Gen.* (1842), 1 Phil. 321.

(*x*) 1 Edw. VII. c. 5.

(*y*) *R. v. Mussey* (1738), 1 Web. Pat. Cas. 41.

(*z*) 23 & 24 Vict. c. 34. As to actions against the Crown and its servants generally, see p. 33, *ante*.

(*a*) 9 Geo. III. c. 16. Cf. 24 & 25 Vict. c. 62.

(*b*) 32 Geo. III. c. 58; this form of procedure is abrogated by 1 & 2 Geo. VI. c. 63. s. 9. Cf. for a limit of three years in treason cases (save assassination) 7 & 8 Will. III. c. 3. As to death duties, see Finance Act, 1894, s. 8 (2). For the exercise of the right, see *Public Works Commrs. v. Pontypridd Masonic Hall*, [1920] 2 K. B. 233.

(*c*) *Case of Ecclesiastical Persons* (1601), 6 Co. Rep. 14 b.

Special arrangements exist for payment of contributions in respect of rates on public buildings. The presumption is always for the freedom of the Crown (*d*), even so as to exempt the driver of a War Office lorry from the speed limit (*e*) or the user of government scales from the Weights and Measures Act (*f*). Land of the Crown in military hands cannot be made save by statute to bear expenses for repaving a street (*g*).

The King again is never a minor, so that his assent to grants and laws is valid, but statutory provision is regularly made for a regency (*h*). Moreover, if his right and that of a subject compete, the latter yields.

**The Crown as *Parens Patriæ*.**—As *parens patriæ* the King has the right of taking care of the persons and estates of infants, idiots, lunatics and insane persons, and of superintending charities. Jurisdiction as to infants has been transferred to the Chancery Division of the High Court from the Lord Chancellor (*i*). In the case of idiots and lunatics administration is granted by sign manual warrant to the Lord Chancellor, though he has no inherent jurisdiction in this respect (*k*); custody and care of property are by statute given to the Commissioners in Lunacy under the judge in lunacy (*l*), now the Board of Control. Charities are now administered by the Charity Commissioners, and jurisdiction belongs to the Chancery Division.

**Property Rights.**—The Crown has many prerogative rights in relation to property, such as the right to escheat (*m*), but forfeiture of land has been entirely abolished by the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), and 1 & 2 Geo. VI. c. 63, s. 12; the right to royal mines of gold and silver; the right to the foreshore (except in the Duchy of Cornwall, where it belongs to the holder thereof, and except where it has been granted out to the lords of manors), and to lands formed by alluvion, or left bare by diluvion; the right to hold its

(*d*) *Att.-Gen. v. Donaldson* (1842), 10 M. & W. 117.

(*e*) *Cooper v. Hawkins*, [1904] 2 K. B. 164. It is not clear that this is now applicable in view of the Road Traffic Act, 1930 (20 & 21 Geo. V. c. 43), s. 121, which has been adduced to justify proceedings against a soldier in a similar case. See also *Chare v. Hart* (1919), 88 L. J. K. B. 833; locomotive drawing too many wagons.

(*f*) *R. v. Kent Justices* (1890), 24 Q. B. D. 181.

(*g*) *Hornsey Urban District Council v. Hennell*, [1902] 2 K. B. 73.

(*h*) See p. 128, *ante*.

(*i*) 15 & 16 Geo. V. c. 49, s. 56 (1).

(*k*) *Statute Prærogativa Regis*, cc. 11, 12; *Oxenden v. Compton* (1793), 2 Ves. 69, 71; *Beverley's Case* (1603), 4 Co. Rep. 123 b, 126 a, b; *Lysaght v. Royse* (1804), 2 Sch. & Lef. 151. Appeal from the Lord Chancellor lay to the King in Council until given to the Court of Appeal in the Judicature Act, 1873; see now 15 & 16 Geo. V. c. 49, s. 26 (2) (c).

(*l*) Lunacy Acts, 1890—1922; Mental Deficiency Acts, 1913—1927 (3 & 4 Geo. V. c. 28; 15 & 16 Geo. V. c. 53; 17 & 18 Geo. V. c. 33); Mental Treatment Act, 1930 (20 & 21 Geo. V. c. 23).

(*m*) Escheat, or at least escheat *per defectum sanguinis*, has been abolished by the Administration of Estates Act, 1925 (15 & 16 Geo. V. c. 23), s. 45, but the estate of a person dying intestate without next of kin will still go to the Crown as *bona vacantia* in lieu of any right to escheat (see s. 46 (1) (vi)). It may be noted that by the Petroleum (Production) Act, 1934 (24 & 25 Geo. V. c. 36), s. 1, the property in petroleum and natural gas existing in strata in Great Britain is vested in the Crown; this is a reassertion of older claims reduced early to gold and silver mines.

property exempt from taxation (except when expressly named in statutes, and except as to statutory private estates); the right to *bona vacantia*, or goods in which no one can claim a property, such as the personal estate or persons dying intestate and without next of kin, or personal estate vested in trustees for beneficiaries all of whom are dead, the personal property of a dissolved corporation (*n*), wreck not claimed within a year, treasure trove, waifs (*viz.*, stolen goods thrown away by a thief in flight), estrays (*viz.*, wandering animals where the owner cannot be found); and the right to royal fish (*viz.*, whales and sturgeons caught within territorial waters), and royal swans (*viz.*, swans swimming in open and common rivers, and unmarked).

**Titles of Honour.**—The Crown enjoys the sole right of conferring titles of honour, dignities and precedence (*o*). The various ranks of the peerage and the mode of appointment have been mentioned above (*p*). Baronetcies date from James I., and are conferred by letters patent (*q*). A Royal Warrant of February 8, 1910, provides that entry on the official roll, kept by the Home Secretary, is necessary for official recognition of the style. Disputes may be disposed of by a committee of the Privy Council. Knights are created by direct corporeal investiture, or by letters patent. A voluntary society, the Imperial Society of Knights Batchelor, seeks to secure a correct register. Women are not eligible for baronetcies or knighthoods. The power is exercised on the advice of ministers, in most cases the Prime Minister, who must assume responsibility therefore for the creation of the ex-King to be Duke of Windsor, in 1936. But in certain cases of departmental services, the Secretary of State for Foreign Affairs, or India, or the Dominions, or the Colonies (*r*), and the ministers at the head of the defence departments, make their submissions direct to the King, but with the assent of the Prime Minister. The Royal Victorian Order, the Victorian Chain, and the Order of Merit are, however, in the royal control personally, and, though the King cannot well carry reluctance to award an honour to the length of a constitutional breach with ministers, as shown by Edward VII.'s acceptance of a peerage and K.P. for Lord Pirrie, and his very reluctant grant of the Garter to the Shah of Persia, he has clearly the right to ask for the most careful consideration of any objections he may offer (*s*). In view of serious scandals in the purchase of honours, especially under Mr. Lloyd George's administration, it has been made a misdemeanour to obtain or give a reward for a dignity (*t*),

(*n*) *Wells, In re; Swinburne-Hanham v. Howard* (1932), 101 L. J. Ch. 346; Companies Act, 1928, s. 71; 1929, s. 296.

(*o*) *The Prince's Case* (1606), 8 Co. Rep. 1 a, 18 b.

(*p*) See p. 79, *ante*.

(*q*) For the form, see S. R. & O., 1927 (No. 425), p. 135.

(*r*) See Parl. Pap., Cmd. 1789.

(*s*) Keith, *The King and the Imperial Crown*, pp. 341 ff.; Esher, *Journals*, iii, 128 (September 10, 1913), claims that his view should be final.

(*t*) Honours (Prevention of Abuses) Act, 1925 (15 & 16 Geo. V. c. 72). The first case under the Act was decided in 1933. Money paid for such a purpose cannot be recovered: *Parkinson v. College of Ambulance*, [1925] 2 K. B. 1. Cf. *Maurandy Gregory, In re; Trustee v. Norton*, [1935] Ch. 65 (C. A.). For evidence of the traffic, see 51

and a Political Honours Scrutiny Committee is created, of three Privy Councillors, by each Prime Minister, to report on the character of proposed recipients of honours (*u*), one point to be determined being that no payment to a political fund is connected with the recommendation. The King must be informed if the Prime Minister recommends against their advice.

Honours lists are normally issued on January 1, and the King's birthday, but also on special occasions, such as the royal Jubilees of 1887, 1897, and 1935, and the Coronations of 1902, 1911 and 1937. In such cases the opposition leader is usually asked to suggest a few names in order to mark the occasion as national. Honours for Dominion services are recommended by the Dominion governments, but responsibility also rests on the British Government, as they are British honours (*x*).

By a curious practice, established since 1868, an outgoing Prime Minister is permitted to recommend honours for friends, while they themselves are always offered honours. Lord Beaconsfield's dislike of these "pesterers of the eleventh hour" is recorded (*y*), but he asked for a peerage for his wife in 1868 (*z*), and for a barony for his private secretary in 1880 (*a*). Mr. Baldwin, in like manner, secured a viscounty for a minister who had been a private secretary in 1937.

The King's power to grant precedence is limited by statute (*b*), but this does not interfere with the precedence given to baronets above knights or to a foreign prince as consort of the Sovereign (*c*). The Crown's permission is requisite for the acceptance of foreign orders, now regulated by Foreign Office Rules, dated March, 1930, and all matters as to wearing insignia are regulated by prerogative, as are the classes of honours, and the nature of services in respect of which they are granted (*d*). All official medals and decorations are authorised by the Crown, and are thus recognised throughout the Empire.

H. L. Deb. 5 s. 129, 507—510; Lord Carson, 51 *ib.* 136. For the baronetcy of A. Grant in 1924, see Snowden, *Autobiography*, ii, 687—690; Keith, *Responsible Government in the Dominions*, ii, 1023, n. 1. In 1868, Mr. Disraeli wished to reward pecuniary aid by a peerage for Mr. A. Montagu, but he wisely declined: Monypenny and Buckle, ii, 418 f.

(*u*) 57 H. L. Deb. 5 s. 1068. See Keith, *The British Cabinet System, 1830—1938*, pp. 540 ff.

(*z*) The G.C.M.G. conferred on Sir P. Duncan on appointment as Governor-General of the Union of South Africa in 1937 was suggested by the King and approved by Gen. Hertzog: House of Assembly Debates, February 9, 1937. The Dominions may, of course, create local honours and take sole responsibility.

(*y*) Monypenny and Buckle, ii, 1402 ff. His appointment of Mr. Lennox to the head of the Civil Service Commission was so flagrant a job that the Cabinet compelled its withdrawal.

(*z*) *Ib.* ii, 438 ff.

(*a*) *Ib.* ii, 1400 ff.

(*b*) 31 Hen. VIII. c. 10.

(*c*) *Anon.* (1611), 12 Co. Rep. 81.

(*d*) The Orders of the Star of India and the Indian Empire are appropriate for services in regard to India, that of St. Michael and St. George for Dominion and colonial services. Permission to wear foreign orders is not freely given: cf. Elizabeth's maxim, "I will have my dogs wear no collars but mine own"; Tilley and Gaselee, *The Foreign Office*, pp. 288, 289.

The Crown again determines all matters as to naval and other salutes (*e*), as in the case of the twenty-one gun salute assigned to the papal representative, which evoked in 1937 protests from Protestant sources, and of the rulers of the Indian States, whose rank and personal services are thus recognised (*f*). It may be added that Queen Victoria accorded recognition to the nobility of Malta, but without giving any precedence in the United Kingdom, and one hereditary Canadian title was also recognised.

The title of Lord Mayor, in Scotland Lord Provost, is conferred by the Crown (*g*), and the Crown regulates the use of the style, Honourable by oversea ministers, legislative councillors and judges (*h*).

(*e*) For an amusing constitutional episode, see Keith, *The King and the Imperial Crown*, pp. 359—362.

(*f*) A list is given in the annual *India Office List*. In Eire the Government is invested with the royal prerogative (Art. 49 (2)), but no title of nobility may be conferred (Art. 40 (2)).

(*g*) In certain cases the style Right Hon. is given: London, York, Edinburgh, Glasgow, and in the Dominions Adelaide, Brisbane, Hobart, Melbourne, Perth, and Sydney, and Dublin. So also Belfast, and the Chairman of the London County Council.

*h*) Keith, *The Dominions as Sovereign States*, p. 666.

## CHAPTER V.

## THE LEGISLATIVE POWERS OF THE EXECUTIVE.

**Former Legislation by Proclamation.**—Though gradually the power of legislation was more and more appropriated by Parliament, the Crown claimed the ordinance power, and, while protests in the fourteenth century diminished its use, it reappeared in the sixteenth century in the claim to legislate by proclamation, the Tudors finding it valuable to carry out their efforts at wider regulation of national necessities. Henry VIII., however, secured in 1539 a statutory authority (a) providing that proclamations issued by the King with the advice of his council should have the force of Acts of Parliament; this statute was, however, repealed in the reign of Edward VI. (b), and under Mary the illegality of imposing fresh obligations by proclamation was asserted (c).

In the *Case of Proclamations* (d), Coke, C.J., having been asked by the Privy Council to state his opinion whether the King might by proclamation prohibit new buildings in and about London and the making of starch of wheat, of which latter the Commons complained, it was subsequently resolved by the two Chief Justices, the Chief Baron of the Exchequer, and Baron Altham, after conference with the Privy Council, that "the King by his proclamation cannot create any offence which was not an offence before, for then he may alter the law of the land by his proclamation in a high point; . . . also the law of England is divided into three parts, common law, statute law, and custom, but the King's proclamation is none of these; . . . the King has no prerogative but that which the law of the land allows him."

In spite of this decision, proclamations continued to be issued, and were enforced by the Star Chamber until that Court was abolished in 1641.

Since the Revolution of 1688, the only instance of invalid legislation by means of a prerogative proclamation occurred in 1766, when, in a case of emergency, and Parliament not being assembled at the time, the King was advised by his ministers to lay an embargo on all ships laden with wheat and flour (e). This was done with the object

(a) 31 Hen. VIII. c. 8. The power was very limited, excluding interference with any person's inheritance, liberties, goods and chattels, and infringement of existing laws: Tanner, Tudor, Const. Doc., pp. 530, 532; Holdsworth, iv, 102 ff., 296 ff.

(b) 1 Edw. VI. c. 12, s. 4.

(c) Elizabeth, however, freely used the power: Maitland, Const. Hist., p. 256; Hallam, Const. Hist., i, 236, 238.

(d) (1610), 2 St. Tr. 723.

(e) The "forty days' tyranny" was defended by Camden on the dangerous plea of *salus populi suprema lex*. See Par. Hist., xiii, 250—313; Walpole, Memoirs of George III, iii, 407—410.

of preventing the scarcity arising from exportation, which was authorised by statute, and the ministers were eventually indemnified by Parliament, though not without some difficulty. In 1931, on the other hand, the Government instructed the Bank of England to disregard its obligations as to gold, but at once secured legalisation by the Gold Standard (Amendment) Act, 1931.

**Present Legislative Power of the Executive.**—It is now well-settled law that the Crown cannot by proclamation make or unmake any law (*f*) unless the proclamation is issued by the authority of some Act of Parliament. Royal proclamations have in no sense the force of law; they serve to call attention to the law, but they cannot of themselves impose any legal obligation or duty not imposed by common law or statute (*g*). The Crown may, however, legislate by Order in Council, or by proclamation (*h*) in conquered and ceded colonies (*i*), to which representative governments have not been granted, or in which, despite such a grant, the right to legislate is in part or in whole reserved, as is now normal, for instance, in the Maltese Constitution of 1921 and that of Ceylon of 1931. The power thus to regulate foreign jurisdiction (*e.g.*, formerly in Egypt or China) is made statutory, and has been so since the reign of Queen Victoria. The Crown by letters patent or Order in Council may set up a representative legislature in any territory acquired by settlement (*e.g.*, Vancouver Island in 1856), but not any more restricted form. But in other cases the letters patent are merely concerned with issues of executive character, *e.g.*, the office of Governor-General or Governor. The powers as to currency of the Crown are now statutory (*k*), and are really part of the coinage prerogative enforced and extended by statute. Orders in Council regulating appeals to the King in Council are in most cases now statutory (*l*), but in certain cases are an exercise of the judicial prerogative (*m*). The power to annex, as in the case of Southern Rhodesia (*n*) or Kenya (*o*), is hardly a legislative power, but more akin to an executive prerogative. Nor is the power to regulate the Civil Service, or trade and commerce in war-time, really legislation proper. Whatever the powers of the Crown over the military, air and naval forces may have been, they now rest essentially on statute.

(*f*) See *Chavasse, Ex parte; Grazebrook, In re* (1865), 4 De G. J. & S. 662. A proclamation becomes effective on publication in the *London Gazette*: *Johnson v. Sargent & Sons*, [1918] 1 K. B. 101; for rules as to publication under 40 & 41 Vict. c. 41, s. 3, see S. R. & O., 1916 (No. 550), I., 76.

(*g*) *Grieve v. Edinburgh, &c.*, [1918] S. C. 700.

(*h*) *Jephson v. Riera* (1835), 3 Knapp, at p. 152; *Abeyesekera v. Jayatilake*, [1932] A. C. 260. A proclamation rests on an Order in Council.

(*i*) As to settled colonies, see *post*, Part IX., Chap. III.

(*k*) 33 & 34 Vict. c. 10; 54 & 55 Vict. c. 72; 10 & 11 Geo. V. c. 3. Colonial coinage is regularly regulated in this way by proclamation approved by Order in Council, *e.g.*, S. R. & O., 1935 (No. 1119), p. 216; 1936 (No. 1130), Bahama Islands (silver coinage); for the Jubilee Silver Crown, 1935 (No. 413), p. 215; the new 3d., 1937 (No. 412), p. 418.

(*l*) 7 & 8 Vict. c. 69, s. 1.

(*m*) *E.g.*, Order in Council, March 9, 1921, as to appeals from Johore; S. R. & O., 1921, p. 1502; British North Borneo, November 28, 1914.

(*n*) Order in Council, July 30, 1923 (S. R. & O., 1923, p. 1077).

(*o*) Order in Council, June 11, 1920 (S. R. & O., 1920 (No. 2342), II., 1611).

Proclamations are also used to call the attention of the public to some act of the executive, *e.g.*, the declaration of war or peace, or the provisions of some already existing statute.

**Regulations under Proclamations of Emergency.**—What may be described as an important innovation in our constitutional law is the Emergency Powers Act, 1920 (*p*), which confers on His Majesty the power to issue a proclamation of emergency whenever it appears that: (1) "Action has been taken or is immediately threatened" by any "person or body of persons" which is calculated "to deprive the community, or any substantial portion of the community of the essentials of life"; (2) the action in question must be of "such a nature and on so extensive a scale" as to have the effect just described; (3) the action must attempt to achieve that effect "by interfering with the supply and distribution of food, water, fuel, or light, or with the means of locomotion."

The Proclamation of Emergency, when made by the Crown, is to be in force for only one month, but may be succeeded by another at or before the end of that period (s. 1 (1)). It is to be communicated "forthwith" to Parliament. If Parliament is not sitting, but will in the ordinary course of events resume its sitting within five days, no further step to call together Parliament is necessary. But, if Parliament is not due to resume within five days, then it must be recalled by Proclamation within five days (s. 1 (2)). The Crown may by Order in Council make regulations for securing the essentials of life to the community and for conferring powers on any persons for this purpose (s. 2). But it forbids "any form of compulsory military service or industrial conscription," or any regulation purporting to create the act of striking, or peaceful persuasion to strike, an offence. Offences against the regulation are to be tried by Summary Jurisdiction Courts (s. 2 (3)), but there can be no variation of criminal procedure or imposition of fine or imprisonment without trial. Regulations must be confirmed by resolutions of both Houses within seven days after being laid before Parliament. The regulations so made may be added to, altered or revoked by resolution of both Houses, but such revocation is not to affect any action taken thereunder. A proclamation was issued in 1921, and again on March 28, 1924, but revoked on April 1. On April 30, 1926, a proclamation was necessary and under it a code of regulations. The necessity of preserving order is doubtless full justification of the Act, which was operative in 1926 in destroying the criminal attempt to overthrow the Government by the industrial action of a general strike. It is, however, since it is operative in peace, much more important than the Defence of the Realm Consolidation Act, 1914 (*q*), which was explained by war exigencies, or the analogous Restoration of Order in Ireland Act, 1920 (*r*).

(*p*) 10 & 11 Geo. V. c. 55. For earlier precedents, see 9 Anne, c. 2 (regulations during plague); Contagious Diseases of Animals Act, 1848 (11 & 12 Vict. c. 105), ss. 105, 107.

(*q*) 5 Geo. V. c. 8.

(*r*) 10 & 11 Geo. V. c. 31.

Powers also exist in emergency for control of air navigation, including commandeering and use of aerodromes and aircraft, with compensations (s), for placing restriction on aliens (t), for billeting of defence forces (u), and calling out of reserves and auxiliary forces (x).

**Legislative Power by Delegation.**—Under modern circumstances legislation by Parliament is insufficient to cover the ground. (1) The House of Commons is too busy to enact many necessary laws, and, when it does legislate, it cannot cover all detail; it would be foolish for it to devote too much time to such matters. (2) It has not the technical knowledge necessary to deal with many issues; it would merely accept uncritically what was presented to it. (3) Experimental regulations are often requisite, which can best be issued less formally than by an Act which is difficult to amend, as in the case of town planning regulations, unemployment insurance, or assistance, &c. (4) Unforeseen contingencies must be provided for, as in National Health Insurance Regulations and Orders setting up Trade Boards. (5) Moreover, Parliamentary amendment often leads to bad drafting, which is not eradicated in the Lords and which may generate tedious litigation, requiring an amending Act. Delegation to the Crown in Council or to a department of legislative power is thus easily defended.

But the process has dangers. (1) Legislation may be passed in too skeleton a form, and give too wide a power of action to make new law and to tax. (2) The power of Parliament under its procedure rules and the pressure on its time to scrutinise the regulations made, is inadequate. (3) Moreover, some of the regulations attempt to deprive the subject of recourse to the law Courts for protection. (4) In any case the procedural advantages of the Crown as against the subject render it difficult for the latter to obtain redress for illegal actions committed under the authority of delegated legislation.

It is, however, clear that such delegation meets essential needs which cannot otherwise be provided for, and therefore must continue, and the most that can be done is to take such care as is possible to safeguard its exercise, as by securing that both Houses scrutinise carefully clauses in bills allowing the making of rules, and the extent and mode of exercise of the power, so as to assure that it shall be exercised after full consideration of all relevant issues.

The Committee on Ministers' Powers in 1932 urged the establishment of a Standing Committee in each House to consider proposals to delegate legislative powers contained in bills and to examine regulations made under statutory powers with a view to decide if there were anything exceptional in their terms, as opposed to their merits, so as to demand special notice in Parliament. It recommended clear indications of the extent of powers, deprecated any attempt to exclude judicial consideration, recommended that power to alter Acts should be

(s) 10 & 11 Geo. V. c. 80, s. 7; 26 Geo. V. & 1 Edw. VIII. c. 44, s. 28, Sch. 5.

(t) 4 & 5 Geo. V. c. 12, s. 1; 9 & 10 Geo. V. c. 92, ss. 1, 2.

(u) Army Act, 108A; Air Force Act, 108A, both extended by Army and Air Force Act, 1937, s. 4; 1939, ss. 4, 5 (Annual).

(x) 45 & 46 Vict. c. 48, s. 12. As to Royal Naval Reserve, 22 & 23 Vict. c. 40, ss. 4, 5, 21; 63 & 64 Vict. c. 17; 17 & 18 Geo. V. c. 18, s. 1.

restricted to the minimum, and that, if it were desirable to exclude indefinite possibilities of questioning validity, as in the case of housing schemes, a definite period for legal action should be accorded, as was done in the Housing Act, 1930 (y).

An alternative suggestion stresses the desirability of attaching to each department of State an advisory committee which would consider all regulations which the department desired to make, and be able, if modifications were not made, to raise the issue in the Commons. It has also been suggested that, while the courts should always have the right to determine the issue of *ultra vires*, there might be provided a more rapid procedure, *e.g.*, by immediate application to the House of Lords, or to a single judge of the High Court set apart for that purpose, or to an administrative tribunal of two civil service lawyers with an experienced administrator as president, with the status of a judge (z). There seems no desire on the part of the ministry to proceed on any of these lines.

**Treaty of Peace Orders.**—Of a very important character is the use made in 1935 of the general power to carry out the treaty of peace of June 28, 1919, to issue orders imposing sanctions on Italy in view of her aggression on Ethiopia. The procedure adopted (a) was a very daring one, seeing that it arrogates power to the executive to do anything to implement the clauses of the League Covenant, and in part probably illegal, because it went beyond the terms of Art. 16 of the Covenant by penalising loans to British subjects in Italy (b). It must be regarded in any case as unconstitutional. In the Dominions, legislation was duly enacted specially by their Parliaments after full discussion. To misuse a perhaps legal power is a dangerous precedent which should have been criticised severely in the Commons; naturally, however, the Labour party did not desire to tie its hands in enforcing in like manner when in power its view of League obligations.

**Forms of Delegated Legislation.**—The form assumed by such legislation may be that of Order in Council, the more dignified form, used for such important issues as aliens and air navigation. Or it consists of departmental legislation, whether styled regulations, rules or orders. Occasionally the making of regulations takes place by warrant, as by the Treasury under the Superannuation Acts, or the Post Office Act, 1908 (s. 82), or His Majesty under the Regimental Debts Act, 1893 (s. 13). Special orders do not form a distinct class, though the term is sometimes used of regulations which need Parliamentary resolutions of approval for validity. Terminology is unscientific: "The most scientific explorer cannot make a map of a jungle" (c), is a dictum of the Report on Ministers' Powers.

(y) Parl. Pap. Cmd. 4060, pp. 64—70.

(z) H. J. Laski, Parl. Govt., pp. 357 ff.

(a) Order in Council, October 25, 1935, November 19, December 20 (reducing duties on Yugoslav imports to console that State for loss by sanctions); all repealed July 10, 1936. For Jersey and Guernsey special orders were issued on November 19, 1935.

(b) Keith, Letters on Current Imperial and International Problems, 1935—36, pp. 32, 145—148.

(c) Parl. Pap. Cmd. 4060, p. 27.

**Types of Delegated Legislation.**—The normal type defines clearly the extent of delegation so as to be readily intelligible and enforceable by the judiciary. It gives no power to legislate on matters of principle or to tax, and it does not permit amendment of Acts of Parliament, whether in general or only of the Act by which the delegated power is accorded. Such is the delegation as to speeds of vehicles under the Road Traffic Act, 1930. These principles are departed from in certain exceptional cases. (1) Power has been given without limit ever since 1834 to legislate for the management of the poor (*d*). The financial emergency of 1931 resulted in wide delegation of power as in the National Economy Act, which was used to reduce even judicial salaries to the great annoyance of the judges (*e*), and the Abnormal Importations (Customs Duties) Act. The Import Duties Act, 1932, confers on the Treasury and Board of Trade wide powers of tariff alteration (in part on the recommendations of the Import Duties Advisory Committee), subject to Parliamentary approval or acquiescence. These powers have been added to by subsequent Finance Acts. (2) In certain Acts power has been given to alter the Act in question in order to secure the bringing into operation of the Act; this power is only temporary in character (*f*); it is illustrated by the Government of India Act, 1935, and the Government of Burma Act, 1935. The more general power to alter Acts may be illustrated by the Juries Act, 1922 (s. 6), or the Mental Treatment Act, 1930 (s. 20), or the Local Government (Scotland) Act, 1929 (s. 76). (3) In certain cases the power was very general, as under the Patents, Designs, and Trade Marks Acts, 1883 and 1888, under which the Board of Trade has been held to have complete authority to regulate the registration of patent agents (*g*), or Part IV. of the Road Traffic Act, 1930, for the regulation of public service vehicles; under it Traffic Commissioners regulate, but on appeal the Minister of Transport can make any order he thinks fit. But this order must be a judicial one, based on the appeal, not one of original jurisdiction (*h*). (4) In other cases orders under Acts are to have the same force as if enacted in the Act, as in the case of regulations under the Unemployment Insurance Act, 1935, or the Orders under the Foreign Jurisdiction Act, 1890. But this famous clause does not preclude judicial scrutiny to secure that the Order conforms to the Act (*i*). More dubious is the power (*k*) to a minister

(*d*) 4 & 5 Will. IV. c. 76, s. 15; Poor Law Act, 1930 (20 & 21 Geo. V. c. 17), s. 136.

(*e*) Statutory salaries were restored under 24 & 25 Geo. V. c. 24, by Order in Council, June 6, 1935. Judicial independence was thought to be endangered.

(*f*) Local Government Act, 1929, s. 130. A permanent limited power as to first parish meetings was given to county councils by the Local Government Act, 1894.

(*g*) *Institute of Patent Agents v. Lockwood*, [1894] A. C. 347.

(*h*) *R. v. Minister of Transport; Upminster Services, Ltd., Ex parte*, [1934] 1 K. B. 277.

(*i*) *Minister of Health v. The King; Yaffé, Ex parte*, [1931] A. C. 494. The procedure in such cases is rendered easier by the Housing Act, 1930, s. 11, providing for applications to quash confirming order if illegal: *Errington v. Minister of Health*, [1935] 1 K. B. 349. So the Housing Act (26 Geo. V. & 1 Edw. VIII. c. 51), Sch. II. Cf. for as regards a compulsory purchase order, *South Shields (D'Arcy Street) Compulsory Purchase Order (Appeal of Bainbridge)* (1939), 55 T. L. R. 409. This stresses the fact that the court will not interfere if there is any evidence on which the local authority can act and the Minister confirm.

(*k*) *E.g.*, Small Holdings and Allotments Act, 1908 (8 Edw. VII. c. 36), s. 39; Housing Act, 1925 (15 Geo. V. c. 14), Third Schedule (now repealed).

to confirm an Order, such confirmation to be conclusive evidence that the Order has been duly made and is within the powers of the Act. The value of such a provision has not yet been determined.

From the point of view of the functions of such legislation the powers may be classified as (1) that of supplementing a statute in general terms; (2) adaptation of earlier statutes; (3) amendment of the statute itself, and (4) determination of the time or area of application.

**Safeguards provided by Parliament.**—Parliament often requires that regulations shall be laid before Parliament, either *simpliciter*, or with certain effects. (1) They must be laid in draft and become operative only on approval by resolution, *e.g.*, Orders in Council under the Government of India Act, 1935, or Government of Burma Act, 1935, or recommendations of the Unemployment Insurance Statutory Committee under the Unemployment Insurance Act, 1935 (s. 59), or regulations under the Unemployment Act, 1934 (s. 52); (2) they must be laid in draft, *e.g.*, Orders in Council under the Ministry of Health Act, 1919; (3) they must be laid as made, but (i) shall not operate until approved by resolutions or (ii) shall cease to operate unless approved by resolutions within a specified period, *e.g.*, regulations under the Emergency Powers Act, 1920; in financial issues under the Import Duties Act, 1932, the resolution is that of the Commons only; (4) they must be laid and may not take effect for, say, twenty sitting days, nor at all if either House resolves otherwise, as in the case of special orders under the Unemployment Insurance Act, 1935 (ss. 106, 107); (5) they must be laid but can be annulled or modified on a resolution of either House, as in the case of regulations under the Housing, &c. Act, 1919, or the Unemployment Insurance Act, 1935 (s. 105). The power of the ordinary member of the Commons in fact is negligible, as the rules of the House give practically no effective chance of protest, though it is true that in case (4) a motion to annul might be moved after 11 p.m., and divided on, as this is one of the cases excepted from the usual rule against divisions. The Lords have better facilities but rarely use them.

In the case of the Coal Act, 1938, the Ministry was forced to agree that schemes for amalgamation, if opposed, should go before Select Committees of both Houses.

**Antecedent Publication.**—A further safeguard is antecedent publication under the Rules Publication Act, 1893 (*l*). But many rules are not covered by the Act, *e.g.*, those made by the Ministry of Health, so far as it continues the functions of the Local Government Board, Board of Trade, Revenue Departments, Post Office, Ministry of Agriculture and Fisheries under the Contagious Diseases (Animals) Act, 1878, rules under the Unemployment Insurance Act, 1935, and now (*m*) Rules of the Supreme Court. The Unemployment Insurance Act, 1935, excludes the application of the Act of 1893. But the normal delay of forty days can be evaded on the plea of urgency by the issue of Provisional Regulations; these should be, but often are not, converted into permanent rules without delay. There are special statutory

safeguards, in the form of securing expert advice, *e.g.*, for the rules as to merchant shipping made by the Board of Trade (*n*), as to factories and workshops by the Home Secretary (*o*), as to trade boards by the Minister of Labour (*p*), as to rules as to seeds by the Minister of Agriculture (*q*), as to unemployment assistance regulations (*r*), &c. But the drafting of regulations is asserted to be inferior to that of legislation, for it is departmental and not in the hands of the Parliamentary Counsel's Office; though it does not suffer from Parliamentary amendment, it also evades correction by experts in the Commons.

**Delegation to Non-Governmental Authorities.**—It should be noted that recently wide powers of making of regulations have been conferred on special bodies, not under ministerial control or only partially so. The Wheat Commission under the Wheat Act, 1932, can with ministerial confirmation make by-laws to secure control of wheat sales; it has vainly endeavoured to exclude the law of arbitration by such a law (*s*). The Milk and other marketing boards can make rules, in part with confirmation by the Ministry of Agriculture and Parliamentary control, which can vitally affect men's power to make a living, and the Courts have had to intervene (*t*). The Unemployment Assistance Board suggests regulations for the minister to follow; if they receive Parliamentary approval, they become effective (*u*). The Council of the Law Society can require (*x*) articled clerks to attend law schools. The functions of the Railway and Canal Commission under the Mines (Working Facilities and Support) Acts, 1923 and 1934, are, in part, virtually legislative, for it has to create, not interpret, rights with due regard to public interest and private claims (*y*).

(*n*) 6 Edw. VII. c. 48, s. 79.

(*o*) 1 Edw. VII. c. 22, ss. 80, 81; 1 Edw. VIII. & 1 Geo. VI. c. 67, Sch. II.

(*p*) Trade Boards Act, 1918 (8 & 9 Geo. V. c. 32).

(*q*) Seeds Act, 1920 (10 & 11 Geo. V. c. 54), s. 7.

(*r*) Unemployment Act, 1934 (24 & 25 Geo. V. c. 29), s. 52.

(*s*) *Paul (R. & W.), Ltd. v. Wheat Commission*, [1937] A. C. 139.

(*t*) *Ferrier v. Scottish Milk Marketing Board*, [1937] A. C. 126.

(*u*) Unemployment Act, 1934, c. 29, s. 38. The first set of rules was not a success; then operation was suspended and a new set issued.

(*x*) Solicitors Act, 1932 (22 & 23 Geo. V. c. 37), s. 32.

(*y*) 13 & 14 Geo. V. c. 20; 16 & 17 Geo. V. c. 28; 24 & 25 Geo. V. c. 27. The operation of this system will be superseded by the Coal Act, 1938 (1 & 2 Geo. VI. c. 52), s. 22, from July, 1942.

## CHAPTER VI.

## THE JUDICIAL AND QUASI-JUDICIAL POWERS OF THE EXECUTIVE.

*The Growth of Ministerial Jurisdiction.*

**The Committee on Ministers' Powers.**—With the development of state activity in the sphere of the economic and social life of the community, the number of issues on which disputes might arise between the subject and a government department has naturally greatly increased, and an obvious method of solving them has been to give authority to deal with such issues to governmental departments. Thus, the Poor Law Amendment Act, 1851 (s. 12), gave to the Local Government Board final authority to decide regarding the settlement, removal or chargeability of any poor person. But it is only since national health insurance and old age pensions first were given that the question has become of importance. The publication of strictures on ministerial jurisdiction by Lord Hewart in *The New Despotism* was followed by the setting up of a Committee on Ministers' Powers by Lord Sankey in 1929 which reported in March, 1932. Its views were much more moderate than those of Lord Hewart, but its recommendations, though moderate, have not been acted on by any ministry, either in respect of the legislative or judicial powers of the ministry. The truth probably is that the dangers are by no means specially serious, and they are in the main outweighed by the advantages. The report, however, has special value as presenting a careful analysis of the whole problem.

**Character of Ministerial Decisions.**—A true judicial decision involves, in the opinion of the Committee: (1) the presentation of their cases by the parties to a dispute; (2) the ascertainment of facts (if in dispute) by evidence and with the aid of argument; (3) if law is involved, the submission of legal argument; (4) a decision by finding upon facts and application of law to the facts, including where required a ruling on any disputed point of law (*a*). A quasi-judicial decision involves (1) and (2), sometimes (3), never (4), whose place is taken by administrative action, determined by the Minister's free choice. Both classes of decision are made by Ministers under statutory power, *e.g.*, the former under s. 4 of the Unemployment Insurance Act, 1935, as to insurable employment, and the latter under the Road Traffic Act, 1930 (*b*). In either case certain principles are involved, those of natural justice, *viz.*: (1) No man may act as judge in a case in which

(*a*) Parl. Pap. Cmd. 4060, pp. 73, 74.

(*b*) 20 & 21 Geo. V. c. 43, s. 91; *R. v. Minister of Transport; Southend Carriers, Ex parte, The Times*, December 18, 1931. On s. 81 (2), see *R. v. Minister of Transport; Upminster Services, Ex parte*, [1934] 1 K. B. 277.

he has a personal interest, pecuniary (c), or otherwise (d). It is obviously objectionable that a minister who is eager to further a policy should be authorised to decide issues which need judicially to be decided. (2) No man should be condemned unheard, and he must know in good time what case he has to meet. But this does not demand either oral hearing nor ordinary judicial procedure (e). (3) The grounds of a decision should normally be given, especially if further proceedings are open to the person concerned. Much more dubious is the common demand for the publication of the report of the inspector who often is sent to report on the matters at issue. There seem very substantial grounds for disapproving the suggestion (f).

Quasi-judicial decisions are, generally speaking, administrative decisions, some stage of which possesses judicial characteristics. Such are the decisions of Licensing Justices (g) under the Licensing Acts, 1910 and 1921, the Traffic Commissioners under Part IV. of the Road Traffic Acts, 1930 and 1934, and the Minister of Transport on appeal from the Commissioners.

### *Specialised Courts of Law.*

**Railway Tribunals.**—A number of tribunals appointed by ministers are essentially judicial in character as far as their functions are connected with judicial issues. Such is the Railway and Canal Commission, which was created in 1873 to perform functions originally controlled by the Court of Common Pleas, but found unsuitable. It was reconstituted in 1888, and it was composed of a judge of the High Court and two commissioners appointed by the Home Secretary, and deals with issues of facilities and preferences for traffic, &c.; on law an appeal lies to the Court of Appeal (h). The Court was given

(c) *Dimes v. Grand Junction Canal* (1852), 3 H. L. C. 759 (decision vitiated by fact that Lord Chancellor had shares in company). Cf. *R. v. Hendon Rural Council; Chorley, Ex parte*, [1933] 2 K. B. 696.

(d) *R. v. Rand* (1866), L. R. 1 Q. B. 230; *R. v. Sunderland Justices*, [1901] 2 K. B. 352; *R. v. Sussex Justices; McCarthy, Ex parte* (1924), 93 L. J. K. B. 129.

(e) *Local Government Board v. Arlidge*, [1915] A. C. 120. Cf. *Marriott v. Minister of Health*, [1937] 1 K. B. 128. A minister must not in his quasi-judicial functions receive statements purely *ex parte*: *Errington v. Minister of Health*, [1935] 1 K. B. 249. On the limits of that decision, see *Brighton Corporation (Everton Place Area) Order*, 1937, *In re*; *Robins & Son, Ltd., Ex parte* (1938), 54 T. L. R. 637. He is not bound to go beyond the report of his inspector if a local authority has decided on a clearance order without hearing witnesses: *Falmouth Clearance Order, In re*; *Halse, Ex parte* (1937), 53 T. L. R. 853. For the general rule of hearing a party, see *R. v. Housing Appeal Tribunal*, [1920] 3 K. B. 334, 341, 344; *Cooper v. Wandsworth Board of Works* (1863), 14 C. B. (N. S.) 180; *R. v. Archbishop of Canterbury* (1859), 1 E. & E. 545, 559, 561. For an amazing failure of a court to allow an arbitrator to explain a false allegation against him, see *Catalina (Owners) and Norma (Owners) Arbitration, In re* (1938), 82 S. J. 698.

(f) *Baildon Urban (Park Lane and Tong Park Areas) Confirmation Orders, In re* (1936), 52 T. L. R. 173, *per* Swift, J. Contrast Cmd. 4060, pp. 100—107. Cf. *Offer v. Minister of Health*, [1936] 1 K. B. (C. A.) 40; *Danby & Sons, Ltd. v. Minister of Health*, [1936] 1 K. B. 337.

(g) *Sharp v. Wakefield*, [1891] A. C. 173, 178—181, *per* Lord Halsbury.

(h) Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25); Ministry of Transport Act, 1919, s. 2.

powers as to working facilities in mines (*i*) and amalgamation (*k*). Rates and charges since 1921 are under the Railway Rates Tribunal, whose three members are appointed by the Lord Chancellor, President of the Board of Trade, and Minister of Transport. On law appeal lies to the Court of Appeal, but their functions include much administrative decision, the general revision of railway charges and the periodic revision of standard charges and exceptional rates. They hold office for a fixed period, but may be re-appointed, but the President now holds during good behaviour subject to retirement at age seventy-two (*l*).

**Registrar of Friendly Societies.**—This officer has important powers under the Friendly Societies Act, 1896 (*m*), and can investigate the affairs of societies or branches and decree dissolution. He has also powers under the Trade Union Act, 1913, and Trade Disputes and Trade Unions Act, 1927, and s. 32 (1) of the Industrial Assurance Act, 1923 (13 & 14 Geo. V. c. 8). His appointment is by the Treasury during pleasure.

**General and Special Commissioners of Income Tax.**—Those officers, appointed during pleasure by the Land Tax Commissioners and the Treasury (*n*), hear appeals on income and sur-tax, and are admittedly impartial and competent, though administrative officers may hold the office, and, when not engaged on appeals, execute administrative functions; they may be required to state a case for the High Court. Another Court appointed by the Treasury is the Board of Referees, consisting of professional and business men, who sit at the Royal Courts of Justice to hear appeals on certain technical issues (*o*).

**Wreck Commissioners.**—Under the Merchant Shipping Act, 1894 (ss. 477, 479), the Lord Chancellor appoints a Wreck Commissioner from time to time to investigate shipping casualties under the Shipping Casualty Rules: he is aided by skilled assessors, and may cancel or suspend the certificate of master, mate or engineer; appeals lie to the High Court.

**Marine Superintendents.**—These officers have the power to decide petty claims up to £5 as to wages on foreign-going ships and fishing boats under ss. 137 and 387 of the Merchant Shipping Act.

**The Industrial Court** is anomalous. Its jurisdiction is provided for in the Industrial Courts Act, 1919, and can be exercised only on the motion of the Minister of Labour, based on the prior consent of the parties. The Court has no direct power to enforce its decisions.

(*i*) Mines (Working Facilities and Support) Act, 1923 (13 & 14 Geo. V. c. 20).

(*k*) Mining Industry Act, 1926 (16 & 17 Geo. V. c. 28). Under the Coal Mines Act, 1930, s. 13, it decided as to amalgamation schemes of the Coal Mines Reorganisation Commission. See also Parl. Pap., Cmd. 5069. This work now goes to the Coal Commission under the Coal Act, 1933 (1 & 2 Geo. VI. c. 52).

(*l*) Railways Act, 1921 (11 & 12 Geo. V. c. 55), s. 20; 1 Edw. VIII. & 1 Geo. VI. c. 52, s. 3.

(*m*) 59 & 60 Vict. c. 25, ss. 68, 80.

(*n*) 8 & 9 Geo. V. c. 40, ss. 133, 147—149; Cmd. 615 (1920), Pt. IV., s. IV., p. 359.

(*o*) Cf. *Collins v. Henry Whiteway & Co.*, [1927] 2 K. B. 378, where it was held that their functions are not so judicial as to give proceedings the full immunity of Courts

**Patent Cases.**—The Comptroller-General has jurisdiction in certain cases of refusal to grant or revocation of patents. Appeal used to lie to a law officer, now to the Court.

### *Ministerial Tribunals.*

Other tribunals are more informal. Under the Unemployment Insurance Act, 1935, claims are dealt with by (1) insurance officers appointed by the Minister of Labour; (2) Courts of Referees, of equal numbers of representatives of employers and contributors with a chairman appointed by the Minister; and (3) an umpire, with one or more deputies, appointed by the Crown on the Minister's advice, whose decision is final. Under the War Pensions Act, 1921, there is an appeal to Pensions Appeals Tribunals appointed by the Lord Chancellor. Under the Widows', Orphans' and Old Age Contributory Pensions Act, 1936, and the same Act as applied to Voluntary Contributors in 1937, an appeal lies to a referee or referees selected from a panel of barristers and solicitors, whose decision is final unless a case is stated or required by the Court of Session in Scotland to be stated on a point of law (*p*). Applicants for licences to run vehicles under the Road and Rail Traffic Act, 1933, can appeal to an appeal tribunal of three members, one of legal experience, who is chairman, appointed by the Minister of Transport. Its decision is final (*s*. 15).

**Judicial Decisions by Ministers.**—In a few cases, as in respect of payments demanded by local authorities under the Public Health Act, 1875 (*q*), a Minister has a function of decision which is truly judicial. In the case of the question of insurable employment (*r*), the Minister's decision is appealable to the High Court to which he may refer the issue in the first instance. In such cases he acts through a specially constituted body. The Board of Education (*s*) acts in a judicial capacity in matters affecting the duty of local authorities to maintain non-provided schools, and *mandamus* lies to it if it fails so to act.

**Quasi-Judicial Decisions.**—Under the Housing, &c. Act, 1909, the Minister of Health must decide issues between medical officers of health for the county and districts as to information to be supplied to the former (*t*). The Board of Education must decide whether any school is necessary if dispute arises, and so must consider the views of local authorities, parents, and ratepayers, and may hold a public enquiry, the report of which is made public (*u*). Such

(*p*) 26 Geo. V. & 1 Edw. VIII. c. 33, s. 30, as amended by 1 Edw. VIII. & 1 Geo. VI. c. 39, s. 14. Cf. *Gammie v. Scottish Dept. of Health*, [1932] S. C. 644; *Scottish Dept. of Health v. Gilbertson*, [1933] Sc. L. T. 521; under 20 Geo. V. c. 10.

(*q*) 38 & 39 Vict. c. 55, s. 178; *R. v. Local Government Board* (1882), 10 Q. B. D. 309.

(*r*) National Health Insurance Act, 1936 (26 Geo. V. & 1 Edw. VIII. c. 32), s. 161; Unemployment Insurance Act, 1935 (25 Geo. V. c. 8), s. 84; applied to pension questions, 1 Edw. VIII. & 1 Geo. VI. c. 39, s. 14.

(*s*) Education Act, 1921 (11 & 12 Geo. V. c. 51), s. 29 (2); *Board of Education v. Rice*, [1911] A. C. 179.

(*t*) 9 Edw. VII. c. 44, s. 69 (2) and (3), replaced by L. G. Act, 1933, s. 113.

(*u*) 11 & 12 Geo. V. c. 51, ss. 19, 156.

enquiries, however, are only steps in process; the decision is ministerial, as under the Housing Acts, 1925 (now repealed, 1930, 1935) and 1936, dealing with various forms of clearing and re-development orders and other topics, and the Road Traffic Act, 1930. In all such cases the Minister is the best authority to decide, for the issues involve much more than a mere judicial discretion, though the Railway Rates Tribunal and the Railway and Canal Commission are instances of special tribunals with judicial, legislative and administrative decisions, which have worked well.

Ministerial tribunals are commended on the score of (1) cheapness and celerity of decision, and these advantages—though not without exception—are clearly normal; (2) they are more readily accessible to persons affected and less technical; (3) their members have specialised knowledge; (4) they can secure uniformity of practice better than the courts, and (5) can adapt decisions to a definite line of policy with the advantage of flexibility. Their use for quasi-judicial issues was in 1932 approved by the Committee on Ministers' Powers (x), subject to (1) the retention of the power of the High Court to confine them within their legal sphere; (2) the observance of the rules of natural justice; and (3) appeal on law to the High Court being allowed. The Committee refused to recommend a system of administrative Courts proper on the French model, as inconsistent with the flexibility of the English system which repels rigid separation of powers, and as involving the removal of normal judicial control over administrative proceedings, as to appeals and restriction of action alike (y). Their reasoning is not wholly conclusive.

**Administrative Tribunals not under Ministerial Control.**—A much more unsatisfactory form of jurisdiction is that of the Medical Council to erase the name of any registered medical practitioner, judged after due enquiry guilty of infamous conduct, from the Medical Register, thus depriving him of the power to sign death certificates or sue for fees. No appeal lies (z). The disadvantages of the position have been conclusively established by the Medical Practitioners' Union in a memorandum issued on January 11, 1939; the failure of the Council to recognise the modern developments of manipulative science is clear and indefensible. Far more satisfactory is the power of the Disciplinary Committee under the Solicitors Act, 1932 (a), to strike a solicitor off the rolls, or of the Central Midwives Board to remove a woman from the roll of midwives under the Midwives Act, 1902 (b), for appeal lies to the High Court. Under the Acquisition of Land (Assessment of

(x) Parl. Paper, Cmd. 4060, pp. 97, 98. The Committee adds that inspectors' reports should be published.

(y) Cmd. 4060, pp. 110—112. Cf. L. Q. R., xlix, 106 ff.

(z) 21 & 22 Vict. c. 90; *Allbutt v. General Medical Council* (1889), 23 Q. B. D. at p. 408; *Allinson v. General Medical Council*, [1894] 1 Q. B. 750. The jurisdiction cannot be evaded by application for deregistration: *R. v. General Medical Council; Kynaston, Ex parte*, [1930] 1 K. B. 562. Breaches of etiquette are punished with the severity of a trade union, and judicial control is clearly to be desired.

(a) 22 & 23 Geo. V. c. 37. If the committee refuses to find misconduct, no appeal lies: *Solicitor, In re*, [1934] 2 K. B. 463. But it must not dismiss a case without hearing the complainant: *Solicitors, In re; Marshall, Ex parte* (1937), 54 T. L. R. 161.

(b) 2 Edw. VII. c. 17.

Compensation) Act, 1919 (c), the issue of amount of compensation is decided by one of a panel of official arbitrators appointed by the Lord Chief Justice, Master of the Rolls, and President of the Surveyors' Institution.

**The Prerogative Powers of the Crown.**—It is probable that the Crown cannot now delegate its judicial powers to other persons, as formerly in the case of the Counties Palatine. It still retains in Council the power to act as final Court of Appeal from colonial (d), ecclesiastical, prize Courts, and colonial Courts of Admiralty. The Crown can create commissions to administer common or statute law; the right to create Courts of equity is disputed (e).

**Pardon.**—The Crown's power to pardon is exclusive and inseparable, and is available before and after condemnation, but no pardon is pleadable in bar of an impeachment (f), and the penalty of a *præmunire* under the Habeas Corpus Act, 1679 (31 Car. II. c. 2), for committing to prison out of the realm cannot be remitted, nor can the Crown take away any right vested in a subject by statute or otherwise, save through statute (g), as regards remission of penalties payable to private persons. A pardon may be absolute or conditional; it is since 7 & 8 Geo. IV. c. 28, given by sign manual warrant (formerly under the Great Seal) on the advice of the Home Secretary, either on the recommendation of the judge or jury, or on petition from the criminal or his friends. The Home Secretary can refer the issue to the Court of Criminal Appeal (h). Occasionally the Cabinet decides on controversial issues, as in Sir R. Casement's Case (i), but discussion in the Commons is deliberately discouraged. It is plain that it would be very dangerous to interfere with full executive responsibility in such cases. The effect of a pardon or of serving a sentence is to obliterate the crime (k), but not so as to prevent or mitigate later punishment for any subsequent felony (l). A reprieve may be granted by the Crown in any form and a judge may also grant a reprieve; a reprieve is normal in capital cases when commutation to a nominal life sentence is intended.

(c) 9 & 10 Geo. V. c. 57. For its application to the taking of wayleaves under the Electricity (Supply) Act, 1919, see *West Midlands Joint Electricity Authority v. Pitt*, [1932] 2 K. B. (C. A.) 1.

(d) See Part IV., Chap. IV., post.

(e) Keith, *Const. Hist. First British Empire*, p. 255.

(f) Act of Settlement, 1701, s. 3. A pardon before conviction must be specially pleaded: *R. v. Boyes* (1861), 1 B. & S. 311. It was given under the Great Seal in this case to a reluctant witness in a bribery prosecution.

(g) Remission of Penalties Act, 1859 (22 Vict. c. 32), s. 1; Remission of Penalties Act, 1875 (38 & 39 Vict. c. 80), s. 1; *Todd v. Robinson* (1884), 12 Q. B. D. 530; *Bradlaugh v. Clarke* (1883), 8 App. Cas. 354; *Orpen v. New Empire* (1931), 48 T. L. R. 8.

(h) Criminal Appeal Act, 1907 (7 Edw. VII. c. 23), ss. 19, 23. For procedure on petitions, see Cd. 2315 (1904). On the Home Secretary's special point of view, see H. A. Taylor, *Jix—Viscount Brentford*, pp. 182—184; Keith, *The British Cabinet System, 1830—1938*, pp. 428 ff. Mr. Clynes is an authority for the view that the power of decision in capital cases should not rest with one man.

(i) For Archbishop Davidson's arguments, see *Life*, ii, 789.

(k) *Hay v. Justices of London* (1890), 24 Q. B. D. 561: free pardon removes disqualification for licence to sell spirits retail; defamation on the score of a pardoned office is ground for action: *Cuddington v. Wilkins* (1615), Hob. 67, 81; cf. *Leyman v. Latimer* (1878), 3 Ex. D. 352.

(l) 7 & 8 Geo. IV. c. 28, s. 33; 9 Geo. IV. c. 32, s. 3.

## PART IV.

## The Judiciary.

## CHAPTER I.

## JUDICIAL INSTITUTIONS TO THE TIME OF EDWARD I.

*The Anglo-Saxon Period.*

**Early Institutions.**—The English conquest brought with it primitive ideas of retributive justice under which vengeance for loss of life or property belonged to the family of the wronged. Gradually, this right of vengeance became limited to the near relations of the person wronged, and we find the blood-feud. Then there grew up the idea of compensation, the Anglo-Saxon *bot*, for the wrong done, and the view that, except in the case of certain bootless offences, the acceptance of compensation, on a basis definitely regulated for the various classes of offence, ought not to be denied; this is clearly seen under Alfred. The fact that the bishop seems to have sat in the Shiremote may have facilitated development, for the Church preached the doctrine of atonement for the wrong done. Part of this compensation went to the King, and was called *wite*; it may have been originally a payment to the folkmoot for judging or for exercising constraint on the person required to pay, which passed to the King as his power extended. The other part went to the injured party or his relatives, and was called *wer* or *were*. Few at first, by the time of the Conquest the list of bootless crimes had been widely extended (*a*).

It has been suggested that the origin of the distinction between crime and tort is to be found in the fact that the King, in order to replenish his exchequer, overlooked the bootless offences on payment of a fine to himself; but in view of observations of primitive societies it is possible that the underlying idea which differentiates crime from tort may always have been as it is now, the feeling whether of religious origin or not, that certain wrongs inflict injury on society as a whole, and the need of preventing its recurrence. The Norman conquest seems to have brought with it the conception of the King's interest as not merely pecuniary but as avenger.

As soon as this stage was reached the difficulty arose, which has arisen in all legal systems, of inducing the plaintiff and defendant to submit to the jurisdiction of the various Courts instead of taking

(*a*) *Leges Henrici (Primi)*, c. x (1); Stubbs, *Sel. Chart.*, p. 125. Canute (Liebermann, i, 317) has a very brief list. On *wites*, see Jolliffe, *Medieval England*, pp. 8, 45.

private revenge; thus there is a provision in the Doms of Ine of Wessex, A.D. 680, against taking the law into one's own hands. Soon the penalties of distraint and outlawry were used to compel consent to the jurisdiction, but without complete success.

**Anglo-Saxon Courts of Justice.**—Not much is known of these Courts; the following results are probable:—

(1) The Shiremote or County Court is usually regarded as the representative of the ancient folkmoot of the small tribes whose union formed the Kingdoms, or as in some cases the result of sub-division of a larger area. It seems to have dealt with criminal and civil business too important for disposal in the hundred Courts. It may have been convened by the sheriff; it was attended by the bishop and ealdorman and the landholders constituted the Court; it is not clear whether it was the practice that the twelve senior thegns should declare the doom of the Court. Edgar ordered its convening twice a year, but it may have met oftener, at least for civil business.

(2) The Hundred Court—whatever the origin of the hundred (*b*)—met under the sheriff or his deputy every month to decide civil and criminal business; as in the County Court ecclesiastical business was included in its sphere. When the system of fri-borh or frankpledge (*c*) was adopted, the Court twice a year seems to have undertaken the function of seeing that every man was duly enrolled in a tithing, or group of ten men, who were responsible for the good behaviour of all the rest. On an offence being committed by one of their number, the rest were bound to produce him, or, in the event of their being implicated in his escape, to make good the loss.

(3) Even in this period portions of hundreds or hundreds were placed under the control as regards jurisdiction of the church or the secular lords who held the lands in question, thus converting national into territorial or feudal jurisdiction (*d*). This seems not older than the 10th century and existed under Canute; there were two forms; the King gave, usually to a religious house, full possession of a hundred and the bishop's or abbot's reeve took the place of the sheriff; or he gave soke and sake, which imposed on those affected, the duty of suit to the Court of the grantee (soke), who was authorised to exercise

(*b*) Cf. H. M. Cam, *The Hundred and the Hundred Rolls* (1930); E. H. R., xlvii, 353—376; Jolliffe, E. H. R., xli, 31—36; Tait (*Medieval English Borough*, pp. 32 ff.) holds that the Shiremote is not found before Edgar, and that the Hundred Court was a remodelling of the old folkmoot, the only regular local Court in the ninth century, while Jolliffe, *Medieval England*, pp. 16 ff., insists that it arose as a voluntary frithgild given judicial powers by Edgar, though Edmund had made it obligatory as an association for thief-taking.

(*c*) See Pollock and Maitland, *Hist. of Eng. Law*, i, 568—571. It seems to represent a combination made by William I. of two Anglo-Saxon practices: (1) the rule under Edgar and later imposing police duties on the tithing; and (2) the rule that accused persons must give borh or pledge to appear to answer a charge: W. A. Morris, *The Frankpledge System*, pp. 29, 30.

(*d*) Maitland, *Domesday Book and Beyond*, pp. 258—290. The Anglo-Norman use of hallimot (heall-gemot, hall moot) for manorial Courts attests the existence of such Courts in Anglo-Saxon times: Stenton, *English Feudalism*, pp. 42, 43. For the date, see Jolliffe, *Medieval England*, pp. 64 ff., against Maitland. It is possible that the hall moots preserve an ancient moot of the vill.

jurisdiction probably in matters of minor importance or those concerning land which were essentially local in interest as opposed to major crimes which remained as pleas of the Crown.

(4) The Witenagemot, or Great Council, which was a meeting of the wise men to settle the affairs of the nation. Plaintiffs could only go there on a failure of justice in the local Courts, for, as Alfred decrees, reference to him should be in the last resort and King and Witan work as a unity in giving dooms (e).

**Anglo-Saxon Law.**—There was no common code of laws administered in these Courts, and after the Danish invasion there were three different sets of law prevailing in different districts: (1) the Mercian Laws, in the Midlands; (2) the laws of the West Saxons, in the south-west; (3) the Danish laws, on the East Coast and in some of the Midlands. From Alfred we have an eclectic compilation of laws (c. 890), and in those of Ethelred (978—1016) and of Canute (1016—35) there are traces of codification. Quite untrustworthy is the alleged collection of laws of Edward the Confessor. The Norman kings made frequent promises to maintain these laws as a means of winning popular favour and to induce the people to grant them the funds required for their various military undertakings.

**Anglo-Saxon Procedure.**—The Anglo-Saxon form of procedure demanded a formal summons by the plaintiff to the defendant to appear. Both then had to plead verbally in set terms, and the defendant was called on to give a pledge to abide by the decision of the Court. The plaintiff had to bring up a *secta* or suit, i.e., a group of witnesses who swore to the genuineness of the cause of complaint. There were then appointed certain proofs to be performed by one or other of the parties; the form might be decided by the parties or the Court.

(1) *Compurgation* and *oath*, or *wager of law*, where the accused or defendant denied the accusation or claim on oath, and brought up other freeholders, generally eleven or twelve, to swear that his claim was true, but from the twelfth century that he was oath-worthy; these were termed *compurgators*; until the twelfth century they were deemed liable to the penalties of perjury if the defendant was in the wrong. The process was popular in the manorial and ecclesiastical Courts.

This form of proof for accusations of crime was rendered of slight value by the Assize of Clarendon (1166), which set up a system of inquisitions under royal authority, and the royal Courts discouraged its use in civil issues, because the defendant could choose his own *compurgators*. But in such cases it appears to have survived in some boroughs, such as London, where the Court or the other party selected the

(e) F. Liebermann, *The National Assembly in the Anglo-Saxon Period*, pp. 59—75. The Witenagemot seems a natural development from the old folk-moot as the kingdoms replaced the small tribes, in those moots often the wisest give the dooms.

compurgators in early times, until 1824 (*f*). It was finally abolished in 1833 by the 3 & 4 Will. IV. c. 42, thus ending its use as a defence in actions of debt, detinue, and account.

- (2) *Ordeal*.—This was used in criminal cases where the accused was taken red-handed or could not get compurgators to swear to his credibility, and generally in cases of deficient evidence. It does not appear to have been used in civil cases.

There were three forms of ordeal, the holding of red-hot iron, plunging the arm into boiling water, and being thrown into water. Curiously enough, in the first two instances going through the ordeal unscathed was the test of innocence, whilst in the latter the person who sank was deemed innocent. Occasionally a poisoned morsel or one containing a feather, had to be swallowed, if he choked, he was guilty. But the system was patently open to corruption, and it necessarily involved the intervention of a priest to give the procedure its sacred character as a manifestation of the divine judgment.

Ordeal was abolished by Innocent III. at the Lateran Council of 1215, and forbidden by Henry III. in a writ addressed to the itinerant justices in 1219.

- (3) *Witnesses*.—These gave evidence only of facts which they had seen and heard (*de visu et auditu*), but only of such facts as were asserted by the party producing them, and then only according to a set formula, that is, they swore to the truth of facts asserted, and the value of their evidence seems to have been determined in some cases by mere number (*g*). There were also legally appointed witnesses to bargains as to chattels (*h*).

- (4) *Charters*.—These were superior to all other forms of proof, and, if old or illegible, they might be reinforced by other evidence.

Such were the Anglo-Saxon forms of proof, for battle as a regular judicial process did not make its appearance until its introduction by the Normans. It must be remembered that culprits caught red-handed or with stolen goods might be put to death forthwith without formal proof. This rule prevailed long after the Conquest, though the justices denounced such executions as murder in 1302. As a local usage it persisted long afterwards as up to 1650 in the Halifax gibbet law.

#### *The Norman Period from the Conquest to Edward I.*

**The Feudal System.**—Some sort of feudal system was no doubt developing amongst the Anglo-Saxons before the Norman invasion, but the grant of jurisdiction to which reference has been made was not yet essentially combined with land ownership. But the free men of the country were tending to fall into relations of greater dependence on lords, partly because the kings gave to their gesiths, who formed their personal officers, their royal rights to dues and maintenance,

(*f*) See *King v. Williams* (1824), 2 B. & C. 538. It was made valid in 1364 as against a claim based on a merchant's books: 38 Edw. III. st. 1, c. 5.

(*g*) *Thorne v. Rolff* (1560), Dyer, 185.

(*h*) Edgar, Secular Ordinance, Suppl. cc. 3—6.

partly because men without land came to place themselves under lords who gave them land on rent or land and homestead in return for work on their lands. From Ethelwulf we find development of royal service as thegns of many degrees, and grants of land to them by charter, bookland as opposed to folkland, but the connection of such land with office was not provided for. Other great men had thegns and this paved the way for the vital change at the Norman conquest, when the King asserted his claim to all the land and the feudal system of land tenure was introduced as he granted to his followers the lands forfeited by the Saxons. Information of the conditions of tenure throughout the country is fortunately available, for the risk of a Danish invasion in 1085 seems to have inspired the King with a desire to ascertain his fiscal resources. The King held a great council at Gloucester, the result of which was the compiling of Domesday Book in the following year. At Salisbury on August 1, 1086, he took a step, apparently intended to counter the excessive dependence of vassal on lord, by requiring that all landholders, mesne tenants no less than tenants in chief, should swear fealty, in accordance with Anglo-Saxon practice (i). William Rufus followed in 1087, Henry I in 1100 and Henry II in 1154.

It is noteworthy, however, that, though the Norman kings thus claimed both *ban* and *arrière ban*, still each lord claimed the right of trying his own vassals in his own court. This claim, so far as it applied to more important criminal issues, eventually failed, and Edward I., by his writs of *quo warranto*, called upon the lords of manors to show title to their rights of jurisdiction, and where they could show none they were prevented from exercising any in future. This was a great step on the road to the establishment of the King's sole right of administering criminal justice, but many lords unquestionably had for a time jurisdiction in capital cases.

**Norman Courts of Justice.**—After the Conquest the Norman Courts of justice were as follows:—

- (1) The Witenagemot or Great Council (*Curia Magna* or *Commune Concilium*).
- (2) The King's Court (*Curia Regis*) and the Common Pleas.
- (3) The Exchequer.
- (4) The County Court or Shiremote.
- (5) The Burghmote.
- (6) The Hundred Court.
- (7) The Manorial Court.
- (8) The Forest Courts.

- (1) The Witenagemot, under the Normans, assumed a feudal character, consisting of the bishops, earls, and probably

(i) The importance of this decision is doubted; cf. Davis, *England under the Normans and Angevins*, p. 37; but see Petit-Dutaillis, *Feudal Monarchy in France and England*, p. 62. Edward I. in like spirit set about to destroy the distinction between immediate vassals and sub-vassals, claiming "to be not only the suzerain of his vassals, but the King of all his subjects" (Pasquet, *H. of Commons*, pp. 208, 209). Cf. Stenton, *English Feudalism*, pp. 111—113; Jolliffe, *Medieval England*, pp. 162 f.

all tenants in chief in theory, though perhaps only the greater tenants were included. In this form its functions were mainly to advise, to assent to taxation and to the early forms of legislation, and in the last resort to exercise a final jurisdiction (*k*), or to deal with great offenders. Only earls and greater barons could bring suits there originally, as being entitled by Magna Carta to *judicium parium* (*l*). Further, matters which proved too difficult for the *Curia Regis* might be dealt with there.

- (2) The King's Court. Originally there does not seem to have been any definite distinction between the King's Court (*Curia Regis* (*m*)), the Council in the Exchequer, and the Great Council (*Witenagemot*, *Commune Concilium* or *Curia Magna*). What is known, however, as the residuary royal justice (*i.e.*, when there was a failure of justice in the local Courts) seems often to have been exercised by the King acting on the advice of a body of men smaller than the *Curia Magna*, but composed of the greater earls and barons, who were members of the Great Council and usually attended his person. Differentiation was slow, but under Henry II. in 1178 we find five judges assigned to the *Curia*, the King reserving for himself in Council matters in which the *Curia* failed to do justice. This is the germ of the Common Pleas, a Court with, it seems, limited functions, based on experience obtained from the use of itinerant justices, at first taking sometimes royal pleas, but usually dealing with suits between individuals, while the *Curia* continued to deal with issues affecting the Crown, remaining long almost indistinguishable from the Council, from which it appears as distinct only under Edward I. (*n*). By a provision of Magna Carta the Common Pleas (that is, the King's Court exercising its civil jurisdiction) was to be fixed in some certain place (*o*), and the other branch of the King's Court, which by the time of Edward I. had become known as the King's Bench, continued to follow the King's person.

Under Henry I., and more regularly under Henry II., itinerant justices were sent to try particular cases or with a general commission.

(*k*) Pike, Const. Hist. House of Lords, p. 28. Cf. Constitutions of Clarendon, c. 11. The King's officers were also members, and he could summon any person he wished, though non-vassals. (*l*) See Adams, Origin of Eng. Const., pp. 57 ff., 373 ff.

(*m*) *Curia Regis* is a term which seems to have been applied indiscriminately to the Great Council (*Curia Magna*), the King's Court, and the shire-mote or County Court when the sheriff presided under the King's writ, or when the itinerant justices presided. See Carter, H. E. L., ch. vi. For the Common Pleas, see Adams, Council and Courts in Anglo-Norman England, pp. 214 ff.

(*n*) Baldwin, The King's Council, ch. iii; Holdsworth, i, 194 ff.; T. H. Tout, Admin. Hist. of Medieval England (1920); modified by Wilkinson, Const. Hist. of 13th and 14th Cent., pp. 122 ff.

(*o*) It seems that the Common Pleas did not become fixed at Westminster for some time after the year 1215: see Pulling, Order of the Coif, p. 91; Baldwin, The King's Council, pp. 47—51. Under Edward III. it sat once at York, and once at Hertford under Elizabeth: Maitland, Select Pleas of the Crown, p. xiii.

- (3) The Exchequer was the King's Court in its financial aspect, receiving twice a year in the palace at Westminster the sums due from the shire and rendered by the sheriff. In its upper division also disputes as to payments and debts were decided, the justiciar presiding, while the lower division received and tested money. Its organisation dates from Henry I., and forms the theme of the *Dialogus de Scaccario* in 1179. But from Henry III. the Council in the Exchequer, reinforcing that body, dealt with a wide range of cases, including cases of merchants, aliens, shipping, customs, royal ecclesiastical rights, riots, trespass, and contempt of the King, equitable claims, &c., matters which later passed to the Council in the Chancery.
- (4) The County Court or Shiremote was the only Court of general jurisdiction. The sheriff presided, and the freeholders of the county were the judges, attendance, which was not popular with the greater owners, becoming a burden on special portions of land. There seems no sufficient ground to hold that any of the suitors were specially chosen as doomsmen or judgment finders (*p*). It had jurisdiction in crime, tort, debt, and to try cases which could not be brought in the manorial or hundred Courts. The process of outlawry could only take place in this Court, where it was practised very late, as in *Wilkes' Case*, and was abolished only in 1938. At first it met twice a year, later once in each month, but there were two meetings of special importance. In it sat the itinerant justices sent by the King, and to such meetings all suitors were summoned, including twelve men from the chartered towns which normally were not represented in the County Court, and the reeve and four lawful men from each vill. Further, the sheriff might deal with any cause, not affecting land, as a royal judge under a writ of *justicies*. But, though the offices were distinct, by Coke's time the two had been assimilated, the old procedure being adopted in all cases.
- (5) The Burghmote was equivalent to a hundred Court in a city (*q*), being probably like it a development of the old folkmoot, found *eo nomine* under Edgar, and the needs of commerce

(*p*) Maitland, *Coll. Papers*, i, 458—466; G. Lapsley, *E. H. R.*, xlvii, 550—567. See Morris, *The Early English County Court* (1926); Plucknett, *Harvard L. R.*, xlii, 639 ff.; xliii, 1083 ff.

(*q*) The antiquity and nature of burghmotes are disputed; on the doubt as to early township moots, see Maitland, *Domesday Book*, pp. 147, 148, 349, 350; Vinogradoff, *Growth of the Manor*, pp. 273, 274. On the boroughs, see Maitland, *Const. Hist.*, pp. 52, 53; Tait, *E. H. R.*, xlv, 177—202; *British Borough Charters*, 1216—1307; S. Webb, *The Manor and the Borough*; C. Stephenson, *Borough and Town* (1933), with criticism by Tait, *E. H. R.*, xlviii, 642—648, and exhaustively, *The Medieval English Borough* (1936), pp. 38 ff. He disproves Maitland's theory of origin in garrisons kept by shire thegns in the ninth and tenth centuries, and Dr. Stephenson's insistence on post-Conquest influence of mercantile development. Jolliffe, *Medieval England*, pp. 124 ff., adopts the view that in Wessex from Alfred's time for a period borough moots superseded shire moots. But there are insuperable difficulties in accepting at present any theory as decisive.

led to the development of the jurisdiction of merchant and craft guilds and special maritime and commercial Courts.

- (6) The Hundred Court was composed of landowners, usually petty, whose conditions of tenure bound them to attendance. It was presided over by the ealdorman in Saxon times, later on by the bailiff of the hundred, an underling of the sheriff, the free suitors being the judges. In the reign of Henry I. it met twelve times a year, later fortnightly, and from the year 1234 once every three weeks. The hundred Court had jurisdiction over personal actions and minor infractions of the peace, and in it the sheriff, in what became known as his tourn, held a view of frankpledge twice a year. At the same time presentments of crime were made by the reeve and four men of each vill, and, if confirmed by at least twelve men of the hundred, the sheriff fined or arrested the accused for the King's justices. By the close of the Middle Ages these tourns were the only really effective part of their jurisdiction. Not being a Court of record, it fell eventually under the provisions of the County Courts Act, 1867 (*r*).
- (7) The Manorial Courts, or Courts Baron (*s*), ranked with the hundred Courts, and depended for their civil jurisdiction on the relation of lord and tenant, provided, in Bracton's view, that the duty of suit was imposed on freeholders by writing. An analogous rule was laid down in 1267 by the Statute of Marlborough. They were incident to every manor in the Kingdom, the steward of the manor presiding, with the copyholders and freeholders as judges. In this Court by-laws were made and local business transacted. It also met every three weeks to try personal actions up to 40s. before the freeholders, in some cases giving a remedy for breach of contract and slander before these were dealt with in the royal Courts, and to decide questions relating to land within the manor in the action called the *Writ of Right* (*t*). Gradually there evolved with the rise of the jury system a distinction between the Court Baron, which dealt with freehold tenants, and the Court customary, which was concerned with villein tenures, this distinction is found in Coke (*u*). At this time the steward seems to have acted as judge for the villeins. In the customary Court copyholds were transferred by surrender and admittance, as they were until 1926. The civil jurisdiction proper steadily declined and finally fell under the terms of the County Courts Act, 1867 (*x*).

Sometimes the lords of manors enjoyed by charter or long usage a measure of criminal jurisdiction, including view of

(*r*) See *post*, p. 235.

(*s*) Cf. Ault, *Private Jurisdiction in England*, who traces the jurisdiction in the twelfth and thirteenth centuries as (i) baronial; (ii) franchisal; and (iii) domanial.

(*t*) See Pollock & Maitland, i, 574 ff. For the Courts of Honours in early feudalism, see Stenton, *English Feudalism*, ch. ii.

(*u*) Co. Litt. f. 58 a.

(*x*) 30 & 31 Vict. c. 142.

frankpledge. This was challenged by *quo warranto* by Edward I., but in 1290 conceded where usage earlier than Richard I. was proved. Thereafter it was administered in the Court as a Court Leet, but gradually became obsolete, though the possibility of its existence is still recognised in the Sheriffs Act, 1887.

In certain cases great lords had courts of honours, to which suit was owed by the tenants in fee, purely feudal in origin, as is recognised under Henry I. But the Crown was reluctant to recognise honours or baronies as distinct from the manors of which they were composed. Their decline was in part due to the invention of royal remedies by assize which rendered their jurisdiction with its ordeal by battle insufficient.

- (8) The Forest Courts, which were held before the warden and foresters, presented criminals before the itinerant justices in eyre of the forest (*y*). The jurisdiction of these Courts was mostly *ex delicto*, but extended also to clearings and leases of forest lands. They were very unpopular, and provisions remitting the burden of attending the forest Courts, and disafforesting certain lands, were inserted in Magna Carta (*z*), and again in the *Carta de Foresta* granted by Henry III. (1217) (*a*). After disuse eyres were renewed as part of Charles I.'s devices for raising funds, but their decisions led to restriction of forest limits by the Long Parliament (16 Car. I., c. 16), and the last eyre was held before 1700. The offices of warden and justices were abolished in 1817, and the powers of these officers were vested in 1829 in the first commissioner of woods, forests, and land revenues.

Other franchise Courts, in addition to the manorial and borough and allied jurisdictions, include the Courts which controlled affairs military and naval, and the universities, and the most important ecclesiastical jurisdiction.

**Features of the Norman and Early Angevin Period.**—The main features to be noted with regard to the administration of justice during this period are: (1) the separation of the civil and ecclesiastical Courts; (2) the rise of royal justice and of a common law through the use of the king's writ, and the corresponding increase in the jurisdiction of the King's Court at the expense of the local Courts; (3) the adoption of the circuit system; (4) the changes brought about in procedure by the royal writ and by the introduction of *battle* and *inquest* or *assize*.

**The Separation of the Civil and Ecclesiastical Courts.**—During the Anglo-Saxon period the bishops sat with the earls and barons in the hundred and county Courts, and clerics and laymen alike were tried in those Courts. The Conqueror, however, in accord with Papal

(*y*) See Holdsworth, H. E. L., i, 94 ff.; G. J. Turner, *Select Pleas of the Forest*.

(*z*) See ss. 44, 47, 48; Stubbs, *Sel. Chart.*, p. 298.

(*a*) This revoked the penalties of death and mutilation of the Assize of Woodstock (1184). See Stubbs, *Sel. Chart.*, p. 344.

requirements, forbade ecclesiastical causes to be tried in the secular Courts (b), and henceforward ecclesiastical pleas were heard under canon law only in the ecclesiastical Courts (c). To this measure is due the subsequent development of the ecclesiastical judicial system.

**The Rise of Royal Justice and the Common Law.**—The adoption of a universal common law was essentially concomitant to the trial of causes from any part of the country in the King's Court, and the carrying of the royal justice into the country by the itinerant justices from the time of Henry II. Anglo-Saxon law was far from uniform, and ill-recorded, for the attempts to summarise it, such as the so-called Laws of Henry I., Laws of William the Conqueror, or Laws of Edward the Confessor, are without great value. The use of canon law in the ecclesiastical Courts and the teaching at Oxford of Roman law doubtless influenced the development of a general law, to which the chief exceptions were the customs of Kent and of London and other boroughs. The process was aided by the assizes or rules of procedure issued by the kings; the records of judicial proceedings, those of the King's Court starting in 1194; the issue of text-books such as those of Glanville, chief justiciar of Henry II., and of Henry of Bracton under Henry III.; and occasional royal enactments such as Magna Carta and its re-enactments or the Constitutions of Clarendon (1164).

The fixing of Westminster as the seat of the Common Pleas by the operation of Magna Carta facilitated the operation of royal justice, as also did the institution of the itinerant justices. Contemporaneously the jurisdiction of the local Courts was drastically reduced. By Glanville's time in criminal and civil cases if the plaintiff alleged the injury to be *contra pacem domini regis* the cause must go to the King's Court, and Magna Carta (c. 24) provided that pleas of the Crown should not be held by the sheriff, who retained only the petty jurisdiction in his tourn (d) and the duty of securing the appearance before the itinerant justices of those accused of serious crimes. In 1461 his powers were further curtailed in favour of the justices of the peace.

By Henry II. (e) it was provided that no one should answer for his freehold without the king's writ; and by a strained interpretation of the Statute of Gloucester, 1278 (f), pleas above 40s. were to be taken in the King's Court. The Statute of Marlborough (52 Henry III.

(b) See Stubbs, *Sel. Chart.*, p. 99; Brooke, *The English Church and the Papacy* (1931).

(c) Henry I. restored the union of the ecclesiastical and secular Courts, but they were again separated by his successor Stephen.

(d) Name given to meetings of the hundred Court, at least when the sheriff exercised criminal jurisdiction. Similarly, constables, who held high manorial jurisdiction, were excluded from pleas of the Crown: cf. McKechnie, *Magna Carta*, pp. 314 ff. These holders of castles (11,000 in number under Henry II.) no doubt abused their powers. And as late as 5 Hen. IV. c. 10, it was necessary to forbid justices to imprison elsewhere than in the common gaol, in view of the misuse of authority of holders of castles. On the sheriff, see Morris, *The Medieval English Sheriff*. Royal jealousy explains his yearly tenure in substitution for an indefinite period.

(e) The exact date is unknown: Glanville, xii, 25.

(f) 6 Edw. I. c. 8.

c. 20) forbade writs of false judgment being dealt with except in the King's Court, and so prevented the development of an appellate jurisdiction from the Hundred. Thus the sheriff's jurisdiction in the county Court was still further abridged. Nevertheless there is some evidence that in the seventeenth century the sheriff had still some judicial business, and that pleas above 40s. were sometimes taken there with some adaptation of procedure to that of the central Courts (g).

**Procedure by Royal Writ.**—The essential innovation in procedure was the use of the writ under the royal seal as an order that justice be done by the sheriff or manorial lord. It has some Anglo-Saxon precedent, it is essentially in origin an exercise of sovereign political authority, which becomes a regular judicial process. Such writs were issued on payment of fees, and the officers of chancery who framed them were virtually able to define rights, subject to the right of the judges to disallow them. The creative period was 1150 to 1250, though the power to frame new writs was given in the Statute of Westminster (h).

Thus to the sheriff might be addressed a *præcipe* (i) for debt returnable to the King's Court, or even for land, a usurpation vainly denounced in Magna Carta (c. 34). Or by a *justicies* the sheriff himself could deal with the case in the county Court. To the manorial Court could be addressed the writ of right for land, containing a *nisi feceris* clause, threatening trial in the sheriff's Court in default. Moreover, at pleasure, the judges would assume that the lord had renounced his Court, and issue the supplementary writs of *tolt*, removing the cause by the sheriff's precept from the manorial Court to the County Court, and *pone*, calling up the cause from the county Court to the King's Court (k). Later the writ of entry gave effective protection to possession or ownership in the King's Court (l).

By writ of error a judgment of a lower Court might be brought up for review in the King's Court; if not a Court of record, by writ of *recordari facias* the judges were ordered to make up a record and send it up to Westminster in the case of the county Court; by writs of *accedas ad hundredum* and *accedas ad curiam* in those of the hundred and manorial Courts.

**Civil Procedure by the Inquest or Assize.**—The Norman régime recognised as a legitimate method of procedure battle, a legalisation of the blood-feud, maintained by professional champions as a rule, to replace compurgation, and it normally was used under the writ of right to decide land claims (m). But side by side grew up a system

(g) Karraker, *The Seventeenth Century Sheriff* (1930). (h) 13 Edw. I. c. 24.

(i) Glanville, i, 6; McKechnie, *Magna Carta*, pp. 346—355.

(k) The manorial Court lost under the Statute of Marlborough, 1267 (52 Hen. III. c. 22), the power it had sought to assume of using the jury system and thus retaining land cases in its control. For the writs, see Holdsworth, i, App.

(l) Glanville does not mention it, but it is a writ *de cursu* from 1245. The distinction of possession and ownership is probably wrongly stressed in Bracton and later. Others suggest that it is to be accepted as valid.

(m) Neilson, *Trial by Combat*, pp. 32 ff.

of enquiry by order of the King, used at first for fiscal purposes, but from the time of Henry I. to settle disputes between the royal tenants in chief. Under Henry II. it was provided by the Grand Assize<sup>(n)</sup> that the defendant in a writ of right could refuse battle, and a writ would issue to the sheriff to choose four knights of the county, who selected twelve more, who decided on oath the issue of ownership from their own knowledge. Witnesses (other than official witnesses) were unknown until about the reign of Henry VI.

The procedure by Grand Assize was subject to great delay through the excuses allowed to the defendant and his right to vouch to warranty his vendor, while several visits to the central Court might be involved, only very minor cases being assigned to the itinerant justices. In order to protect persons in actual seisin, a term covering both the Roman law ownership and possession, Henry II. provided the petty assizes. By *Novel Disseisin* (1166) a person put out of possession could obtain reinstatement against the wrongful disseisor; by *Mort d'Ancestor* (1176) the person held to be heir of the person last in possession on his death could be given possession. There was a criminal element in disseisin, the defendant being fined and sometimes even imprisoned; also an element in tort, damages being awarded early. They were soon followed by development of the writ of entry, the first form of which was the writ of gage asserting that the tenant had right only under a transfer in security which had ceased through payment. The assizes had already been used for ecclesiastical issues. By *Darrein Presentment* the patron who last presented obtained the right to present, without prejudice; by *Utrum* was decided if land was lay or held in frankalmoigne, the Church in the latter case having jurisdiction. In all these cases the sheriff chose twelve knights or freeholders; if they had not sufficient knowledge they were afforced until twelve were found to agree. As in the case of the Grand Assize, these assizes were proceedings in the King's Courts, either at Westminster or on circuit.

**The Criminal Jury.**—The Anglo-Saxon mode of trial in criminal accusations by *ordeal* or by *oath* and *compurgation* was supplemented under the Normans by battle, which was essentially connected with the form of private accusation by appeal, which could be pursued in the King's Court or in Parliament, and which only was abolished in 1819 (o). In such cases appellant and appellee did combat personally and not by champion as usual in the case of writs of right, and the defeated combatant, if alive, was hanged forthwith.

(n) Glanville, ii, 7. The date is uncertain; usually it is placed before 1166, but 1179 is also possible; but cf. Davis, *England under the Normans and Angevins*, p. 280. It was last used in 1835—38 in *Davies v. Loundes*, 1 Bing. N. C. 597; 6 *ib.* 161. It fell with the abolition of real actions under 3 & 4 Will. IV. c. 27, s. 36. The assize *Utrum* speedily became an ordinary possessory action: Pollock & Maitland, i, 246—250; for its possible Norman origin, see E. H. R., xlvii, 1—11. Its main use was to recover land belonging to churches, and after 13 Eliz. c. 10, it was seldom requisite. *Mort d'Ancestor* did not apply to devisable lands, and so became inapplicable when under 32 Hen. VIII. c. 1, and 12 Car. II. c. 24, all lands became devisable.

(o) 59 Geo. III. c. 46, consequent on *Ashford v. Thornton* (1818), 1 B. & Ald. 405.

To secure due punishment of criminals Henry II. had recourse to a form of the inquest, which appears already under Ethelred (*p*). The Assizes of Clarendon (1166) and Northampton (1176) provide for the presentment of criminals to the royal justices by twelve sworn men from the hundred and four from the township, and for decision of guilt by compurgation or by ordeal, failure in which entailed mutilation, forfeiture of property, and banishment; persons found in possession of stolen goods and of bad repute were not allowed compurgation, and in other cases even successful compurgation might involve banishment. Compurgation thus disappeared for serious crime, and the ordeal followed in 1219. To take its place pressure was put on the accused to put himself on the country, which meant that his fate was decided finally by a second or petty jury, at first on their own knowledge, later on evidence (*g*). If he refused to plead he was subjected to the *prison forte et dure* which was distorted into the *peine forte et dure* of pressing to death (*r*), a practice formally abolished only in 1772 (*s*), and recorded in 1658.

### *Judicial Institutions in the Reign of Edward I.*

Edward I. has been called "the English Justinian," because in his reign the judicial institutions of the country became settled upon a basis which remained unaltered in the main until the modern changes brought about by the Judicature Acts, 1873 to 1925. The term, however, is somewhat misleading, for Justinian merely codified the already existing law, whilst Edward I. really altered the already existing institutions, and settled them upon a new and permanent basis. From the *Curia Regis*, as understood in the sense of the King's Court or King's Council, had now separated more or less definitely the Courts of the Exchequer, the Common Pleas, and the King's Bench, while the King's Council, had become a body distinct from the *Commune Concilium*, or Parliament, as a body primarily of political advisers; it assumed, however, certain original judicial functions, principally it seems at this epoch in connection with the issue of new writs, for which no precedent existed in the Chancery or Exchequer, and for which the consent of the council had to be obtained. In the residuary or supervisory jurisdiction of the King assumed by the Council can be traced the origin of the present judicial functions exercised by the Privy Council. A short consideration of the various Courts in order, as they existed in the reign of Edward I. will serve to show how nearly the judicial system approached to that which obtained before the passing of the Judicature Acts.

**The Common Pleas.**—This Court sat at Westminster since the confirmation of Magna Carta by Henry III. It heard especially

(*p*) III. c. 3; Stubbs, *Sel. Chart.*, p. 85; for the Assizes, see *ib.* pp. 170, 179. See p. 315, *post*.

(*g*) At first the juries may have been identical in whole or part; cf. Holdsworth, *H. E. L.*, i, 325, and p. 317, *post*.

(*r*) 3 Edw. I. c. 12; Pollock & Maitland, ii, 651, 652; Stephen, *H. C. L.*, i, 297 ff.

(*s*) 12 Geo. III. c. 20, which made silence a confession of guilt. By 7 & 8 Geo. IV. c. 28, a plea of not guilty is entered.

causes between subject and subject not amounting to a breach of the King's peace, and its records were called *de Banco rolls* (t).

**The King's Bench.**—This Court continued to follow the King, and its records, available from 1194, were therefore called *Coram Rege rolls* (u). Cases of trespass were especially accorded to it, and it was the great criminal Court. It heard appeals from the Common Pleas.

**The Exchequer.**—This Court attended especially to revenue matters, which at this epoch were heard by the treasurer, who had taken the place of the justiciar, and barons of the Exchequer (x).

**The High Court of Parliament.**—Parliament was now tending to become distinguishable from the King's Council, and continued to exercise judicial functions principally in connection with petitions. Where necessary, the King and his Council seek the aid of the barons or magistrates and the Commons to provide new remedies by legislation.

**The King's Council.**—As we have seen, this body, which at this time was essentially official, containing the chancellor, treasurer, justices of either branch and the barons of the Exchequer (y) exercised judicial functions principally in connection with the granting of new writs (z) for which no precedent existed, and acted as a Court for causes of unusual nature (a).

**The Chancery.**—The lord chancellor's power was at this epoch in its initiatory stage, and his functions were mainly secretarial. He had power to issue *de cursu* writs, presumably at one time settled by the King and Council, or those for which a precedent already existed;

(t) Separate rolls exist from 1234, and a separate Chief Justice dates from 1272.

(u) The Sovereign in person used to sit in the King's Court in early times; see Holdsworth, i, 194—212.

(x) See Madox, Hist. Ex., ii, 26. Originally cases in the Exchequer were heard before the justiciar and chancellor; barons of the Exchequer with distinctive judicial and administrative functions were appointed temp. Hen. III. Only in 1579 was the practice adopted of placing the barons on the same footing as the other judges, and of selecting them from serjeants-at-law and of sending them on circuit: Tanner, Tudor Const. Doc., p. 342. Cf. Holdsworth, i, 232 ff.

(y) See Wilkinson, Const. Hist. of 13th and 14th Centuries, pp. 133 ff., for evidence that the Council of Henry III. and Edward I. was not a body of magnates, though this factor increases under Edward II.

(z) Writs for which a precedent already existed were termed *de cursu* writs.

(a) The close relation of council and Parliament is reflected in Fleta—about 1290—where it is said by its anonymous author, who revises Bracton (p. 66): *habet enim rex curiam suam in consilio suo in parliamentis suis*, in which are settled judicial doubts and new remedies are devised for new wrongs, and equitable justice is meted out. We have in germ the jurisdiction of the House of Lords, beside that of the council. So in 1311 the Lords Ordainers demand the holding of Parliaments to determine causes which have been delayed because suitors object to trial in the King's Court in the absence of the King, or cannot there obtain redress against ministers, and to settle pleas on which the judges differ: Pollard, Evolution of Parliament, p. 35. See Pasquet, H. of Commons, pp. 132—134; the King in Parliament settles problems by judgments or legislative ordinances or statute. Cf. Baldwin, The King's Council, ch. xii. But it would be wrong to ignore the fact that primarily judicial business was done by the King in Council during Parliament, and that the activity of the Lords was probably developed from their being asked to aid in deciding important cases with the Council: Wilkinson, Const. Hist. of 13th and 14th Cent., pp. 19 ff., 262 f.

but he could not issue new writs without the leave of the King in Council, for new remedies would give rise to new rights, and this could only be effected with the sanction of the council. The chancellor's judicial authority was thus, on one view (*b*), in its origin derived from the council, which at first seems to have regarded his rising power with some disfavour, for by the Provisions of Oxford, 1258 (*c*), he was forbidden to issue new writs without the council's leave. But it is now probable that the chancellor's jurisdiction was due to royal delegation to him personally; delegation to him aided by a council was the mode of transition to the council's jurisdiction (*d*). Later on, by the Statute of Westminster the Second (*e*), the clerks in Chancery were empowered to issue writs *in consimili casu*, or writs analogous to those already in use. This statute apparently explains the appearance of new writs, grouped under the name of Case, extending considerably the scope of existing writs. But this did not meet all needs, and eventually such causes as the common law Courts could not take cognizance of, by reason of want of precedent for a writ, came under the chancellor's immediate jurisdiction, petitions being referred to him directly; this stage was reached under Edward I. at latest.

**The Local Courts.**—The manorial and county or shire Courts continued to exist at this period, but their jurisdiction was increasingly on the wane (*f*).

**The Circuit System.**—The circuit system, inaugurated by Henry I. and improved by Henry II., continued to flourish at this period, side by side with the justices in eyre, who went through the country at intervals inquiring into the administration of justice and other matters, but whose chief importance was in the financial penalties they levied. In the reign of Edward I. there are traces of the growing importance of the circuits, for the Statute of Westminster the Second (*g*) enacted that the justices or commissioners of assize were to be appointed out of the King's sworn justices, and to act with one or two discreet knights of the shire. By the same statute the commission of *nisi prius* was annexed to that of assize, and to these, fourteen years later, that of *gaol delivery* was also added (*h*).

(*b*) Baldwin, pp. 241, 260 f.

(*c*) See Stubbs, *Sel. Chart.*, p. 378.

(*d*) Baldwin's views are answered by Wilkinson, pp. 196 ff.

(*e*) 13 Edw. I. st. 1, c. 24. On the controversy on this Act, see Wilkinson, pp. 216 ff.

(*f*) See pp. 237, 238, *ante*.

(*g*) 13 Edw. I. st. 1, c. 30. For the commissions, see p. 267, *post*. Special commissions of *oyer et terminer* were also issued freely for dealing with cases of heinous crime under Henry III. and Edward I.: Baldwin, *The King's Council*, pp. 266—269.

(*h*) 27 Edw. I. st. 1, c. 4. The commissioners of assize by 1400, and probably a good deal earlier, entirely superseded the old justices in eyre, whose disappearance, amongst other factors in the breakdown of central control, was one of the causes for the development of the jurisdiction of the council.

## CHAPTER II.

THE DEVELOPMENT OF JUDICIAL INSTITUTIONS FROM EDWARD I. TO  
THE JUDICATURE ACTS, 1307 TO 1876.*The High Court of Parliament as a Court of First Instance.*

WE have seen already that the great earls and barons would bring their suits in Parliament originally instead of in the local Courts as being entitled to *judicium parium*, a term which occurs first in Magna Carta. Private subjects also could petition Parliament, which might try their cases, as also did the Council, and new writs, and therefore new remedies, were sanctioned by this body or the King's Council.

Further, from 1305, cases of treason were preferred in Parliament at the suit of the Crown, but in the fifteenth and sixteenth centuries the practice dropped, and its revival by Charles I. in the *Five Members' Case* led to it being declared illegal. It seems to have been the practice for subjects to bring criminal accusations in Parliament in the reign of Richard II., the procedure being by way of criminal appeal and battle, though none came to the test. A statute of Henry IV. (a) (1399) put an end to criminal appeals in Parliament, but this was not held to prevent accusations by private persons being preferred if not in the form of appeals (b). In 1663 the Lords resolved that a peer could not accuse another of treason (c), and later impeachment, attainder, and indictment took the place of this procedure.

The functions of Parliament as a Court of first instance then came to (1) the Commons' right of impeachment; (2) procedure by attainder; (3) the functions now vested in the House of Lords of trying peers accused of treason or felony; (4) the functions of Parliament as a Court of first instance in civil actions, which are now obsolete; (5) assertion of the privileges of the Lords and Commons, as above described.

**The Commons' Right of Impeachment.**—Impeachment by the Commons before the Lords, presided over by the Lord High Steward in the case of a peer, by the Lord Chancellor in other cases, first came into use towards the end of the reign of Edward III., the first real instance occurring in 1376 (d), where it was used to punish unworthy

(a) 1 Hen. IV. c. 14. In 1387 approval was given by Parliament: Rot. Parl., iii, 236.

(b) In 1626 the Earl of Bristol accused the Earl of Conway and the Duke of Buckingham on various charges (see 2 St. Tr. 1267).

(c) 6 St. Tr. 317.

(d) Pike, Const. Hist. House of Lords, p. 206; M. V. Clarke, Oxford Essays in Medieval History, pp. 164 ff; Wilkinson, Const. Hist of 13th and 14th Cent., pp. 86—107. The Commons never served as part of the council as a judicial body, but rather as a grand jury, informers, prosecutors (Prynne; Pasquet, H. of Commons, p. 135).

ministers during royal incapacity. The question of guilt is determined by a majority of the Lords, and sentence is pronounced if demanded by the Commons. Towards the end of the reign of Richard II. it was used by the Commons in 1386 as a means of bringing ministers of the Crown to account for conduct opposed to the welfare of the State, as opposed to failure in duty to the King, a premature effort to establish ministerial responsibility. From *Lord Stanley's Case* in 1459 until the reign of James I. attainder seems to have taken the place of impeachment, and there is no real case of the latter during that period. Against that of the Duke of Buckingham Charles I. successfully employed the weapons of prorogation and dissolution, but under James I. in 1621 Sir G. Mompesson, a monopolist, and Lord Bacon, and in 1624 Middlesex, the Treasurer, were condemned.

In *Danby's Case* (1679) the principle was established that a minister cannot plead the King's commands in justification of an unconstitutional act; that the bishops could sit and vote on preliminary issues, but not on the final question of guilt; and that a royal pardon should not bar impeachment, a doctrine enacted by the Act of Settlement, 1701, though pardon after condemnation is not affected. In 1685 it was decided by the Lords, reversing an earlier decision of 1679, that impeachment was put an end to by the determination of the session (*e*), and Danby's impeachment came to an end in consequence. In *Warren Hastings' Case* a special Act was passed, providing that the impeachment was not put an end to by prorogation or dissolution (*f*), and a similar Act was passed in *Melville's Case* (1805) (*g*), the last instance of impeachment, which the growth of ministerial responsibility has rendered obsolete in the case of ministers, Lords Oxford, Bolingbroke and Ormonde having been the last ministers to be thus dealt with in 1715. Oxford was released two years later as the Commons could not agree as to procedure, the others fled and were attainted.

In *Fitzharris' Case* (1681) (*h*), the Lords refused to try the accused on the ground that he was a commoner. The Commons thereupon passed a resolution to the effect that "it was their undoubted right to impeach any peer or commoner for treason or any other crime or misdemeanour" (*i*), and in 1689, Sir Adam Blair and four other commoners were impeached. Since then the right of the Commons to impeach a commoner has not been disputed (*k*), and Dr. Sacheverell in 1710 was thus condemned.

Hale, Coke and Holt seem to have believed that the Commons had a share in the judicial power, but the Commons seems to have been indifferent; in 1399 they disclaimed a part in judgments unless specially desired by the King (Rot. Parl., iii, 427); and all the judges in 1485 declared that jurisdiction was vested in the Lords: Y. B. 1 Hy. V. Pasch., pl. 5 (p. 20). For occasional exceptions, see Baldwin, *The King's Council*, p. 330, n. 2.

(*e*) 14 Lords Journ. 11; Robertson, *Sel. Stat.*, pp. 566—569. See also on Danby, Evans, *Trans. R. Hist. Soc.*, 4 s., xii, 105.

(*f*) 26 Geo. III. c. 96.

(*h*) 8 St. Tr. 231.

(*g*) 45 Geo. III. c. 125.

(*i*) 9 Com. Journ. 575, 711.

(*k*) 14 Lords Journ., 260, 262—264; Pike, *Const. Hist. House of Lords*, p. 232. Quite different was the case of E. Floyd, when the Commons quite improperly sentenced a man for expressing disapproval of the Elector Palatine and James I.'s daughter; the Lords protested, and with approval of the Commons imposed a more severe sentence: 3 Lords Journ., 110—134, an equally illegal action. For Sacheverell's case, see Robertson, pp. 421—437.

**Attainder.**—Attainder served as a means of proceeding against a person when no real charge could be substantiated. It took the place of impeachment to a large extent between 1460 and 1621 (*l*), being freely used in the Wars of the Roses and the Tudors, and Parliament revived it against Strafford (1641) and Laud (1645). It was also used against Sir John Fenwick (8 & 9 Will. III. c. 4) (1696), and in 1715 (1 Geo. I. st. 2, cc. 16, 17, 32, 42, 53) against Bolingbroke and Ormonde and others; the form of a Bill of Pains and Penalties was occasionally later resorted to, as against Atterbury or Sir Thomas Rumbold.

These measures are legislative, and it was only at the discretion of the Houses that the accused could defend themselves (*m*). They are doubtless obsolete; forfeiture of inheritance of title or lands through corruption of blood disappeared by the Forfeiture Act, 1870 (*n*).

**The Peer's Right of Trial by the House of Lords in Cases of Treason and Felony.**—The expression of right of trial by one's peers occurs first in Magna Carta, *judicium parium*, where the reference is to cases affecting the rights of landholders. But since then peers have always claimed their right to be tried in cases of treason and felony by their own equals, because it would seem that, as forfeiture resulted on conviction, they would not submit to the jurisdiction of their inferiors in estate. The spiritual lords never claimed the right to be tried as peers, relying on their right to be tried in their own Courts by claiming *Benefit of Clergy*. Cranmer in 1553 put himself upon a jury and did not claim trial by the peers, and since then the right has never been put forward (*o*). Further, spiritual lords are not entitled to give their vote in the trial of a peer on the final question of guilty or not guilty, not being capable of passing a blood sentence, but they may sit and vote on preliminary issues. The position is logically absurd as they can vote on attainder bills. Any peer of England, Ireland, Scotland or the United Kingdom, and by statute of 1441 (20 Hen. VI. c. 9) any peeress by birth or marriage (*p*), is entitled to trial by the peers, and the privilege cannot be waived. Indictment takes place as usual, then the case is brought to the House of Lords if in session on *certiorari* as in *Earl Russell's Case* (*q*). Decision is by majority vote, not by unanimity as in the Court of the Lord High Steward.

(*l*) Pike, Const. Hist. House of Lords, p. 228.

(*m*) Trial was normally a preceding stage in Tudor usage, but in several cases no formal trial was allowed, e.g., Countess of Salisbury's Case (1539), Cromwell's Case (1540), Katherine Howard's Case (1542): Tanner, Tudor Const. Doc., pp. 423—432; 4 Co. Inst., 37.

(*n*) 33 & 34 Vict. c. 23, s. 1.

(*o*) Pike, Const. Hist. House of Lords, p. 221. The termination of the feudal tenures would normally have ended the privilege, but it was expressly preserved. See L. W. Vernon Harcourt, His Grace the Steward and Trial by Peers.

(*p*) Tanner, Tudor Const. Doc., pp. 427—432. Peers cannot practise as counsel in such cases, or before the committee for privileges, as opposed to ordinary appeals: *Lord Kinross, In re*, [1905] A. C. 468.

(*q*) [1901] A. C. 446. Earl Russell was tried for bigamy, and the next case was that of Lord de Clifford for a possible manslaughter, December 12, 1935; H. L. Paper, 12, 1935—36. For misdemeanours, trial in the ordinary manner applies: *R. v. Kyslant*, [1932] 1 K. B. 442.

The House is presided over by the lord high steward appointed for this purpose under the Great Seal. The peers are the judges, and the verdict of the majority decides the question. The procedure is very costly, and unjust, and its abolition is long overdue, but a bill in 1936 was not carried to acceptance by the Commons. As the Lords are the judges, the judges are solemnly summoned to advise.

*The Court of the Lord High Steward.*—If Parliament is not sitting, the peer is tried by the Court of the Lord High Steward, who is a peer appointed to preside under the Great Seal. This Court dates from the reign of Henry V., when in 1415 Lord Scrope was thus tried, and originally the lord high steward could summon any twelve or more peers and thus pack the Court. But by 7 & 8 Will III. c. 3, in cases of treason or misprision of treason the lord high steward must summon all temporal peers twenty days before the trial, and they are entitled to sit and vote. The lord high steward acts as judge and settles all points of law, the peers acting as the jury, bishops never sitting in the Court. The last trial was that of Lord Delamere for treason in 1686. For some unexplained reason this form of trial was not resorted to in Lord de Clifford's case.

**Parliament as a Court of First Instance in Civil Actions.**—The King in Council in Parliament under Edward I., and later, heard cases originally, but this jurisdiction, unlike the appellate jurisdiction, did not pass to the Lords when the Council became distinct from Parliament; in Tudor times these went to the Council. The jurisdiction was revived in 1621; and Prynne defended its exercise by the Long Parliament in Lilburn and Maynard's cases (1646—47). The last occasion on which an ordinary civil action was brought in Parliament was the case of *Skinner v. East India Company* (1666—70) (r). Skinner petitioned the King, complaining that the Company had seized his ship and committed other injuries, including trespass to land overseas, for which the English Courts could give no redress. The case after having been referred to a committee who reported favourably to the petitioner, was heard by the Lords, who awarded Skinner £5,000 damages. The Company then petitioned the Commons, who declared the trial by the Lords illegal. A dispute between the two Houses ensued, and Parliament was prorogued. The matter was finally settled by the King's intervention in 1670, and the records of the case erased by both Houses. Since an abortive attempt in 1693 no effort has been made to bring a civil action in Parliament as the Court of first instance.

#### *The Appellate Jurisdiction of Parliament.*

**The House of Lords.**—In the reign of Edward I., as we have seen, error lay from the Common Pleas to the King's Bench, but the Exchequer in 1338 refused to send error there, and in the reign of

(r) (1666), 6 St. Tr. 710; Robertson, *Sel. Stat.*, pp. 355—361. The Lords' claim to hear civil cases in this way was associated with the revival of its criminal jurisdiction on impeachment. Cf. Hallam, *Const. Hist.*, iii, 21 ff.

Edward III. the first Court of Exchequer Chamber (which was really a committee of the King's Council, presided over by the Chancellor and Treasurer until 1668, then by the Lord Chancellor or Lord Keeper) was formed to review errors in the Exchequer. Under Elizabeth an analogous Court was created to hear appeals from King's Bench (s), the judges of Common Pleas and the Exchequer constituting it, but its powers applied only to certain classes of cases, excluding those dealt with by the King's Bench on appeal and proceedings to which the Crown was a party.

There was still, however, an ultimate Court of Appeal superior to the Court of Exchequer Chamber, namely, the King in Council in Parliament, and, when the council split off definitely from Parliament, as it did about the reign of Richard II., this appellate jurisdiction of the King in Council in Parliament became vested in the House of Lords. This body was recognised as the ultimate Court of Appeal, probably by the time of Henry IV. (t). The Commons in 1399 disclaimed judicial power, and the judges sank to the rank of assistants and advisers, in which capacity they still receive a summons to Parliament. In 1830 it was statutorily provided that error from the King's Bench, Common Pleas, and Exchequer should lie to the Court of Exchequer Chamber, and thence to the House of Lords (u). The Court was composed of the judges of the other two Courts in each case.

Thus the House of Lords takes the place of the *Curia Regis* with regard to its appellate jurisdiction. On the other hand, despite an Act of 1341, the Lords early disused the practice of interference with the procedure of inferior Courts.

The jurisdiction of the House of Lords in Chancery appeals came later. In 1616, James I. correctly insisted that Chancery was subject to him alone; he could order a commission to rehear a case, but otherwise a private Act to overrule the Chancellor was necessary. In *Bourchier's Case* (1621), and *Mathew's Case* (1624), the Lords refused jurisdiction. But in 1640 and after the Restoration the Lords usurped jurisdiction. In the reign of Charles II., 1675, the Commons disputed this jurisdiction, but since then the House of Lords has exercised it without interruption (x).

### *The King's Council.*

It remains to trace the developments which occurred with regard to the other portions of the original and appellate jurisdiction of the King in Council as exercising what remained of the old right of administering the residuary royal justice. The original jurisdiction of the council will be found to develop into the criminal and civil jurisdiction exercised by the Star Chamber, the civil jurisdiction of the

(s) 31 Edw. III. st. 1, c. 12; 27 Eliz. c. 8; 31 Eliz. c. 1.

(t) See Carter, H. E. L. I., p. 97; Baldwin, *The King's Council*, ch. xii; Stubbs, *Const. Hist.*, iii, 24, 494. In 39 Edw. III. the Common Pleas refused to recognise reversal by the council because it was not a proper place.

(u) 11 Geo. IV. & 1 Will. IV. c. 70; 15 & 16 Vict. c. 76, ss. 148, 149, 152, 157.

(x) Pike, *Const. Hist. House of Lords*, p. 298; *Shirley v. Fagg*, 6 St. Tr. 1122; Hale, *Jurisdiction of House of Lords*, pp. 195—197; Grant Robertson, *Sel. Stat.*, pp. 368 ff.

Court of Requests, and the jurisdiction of the Court of Chancery, of which, under the modern system, the Court of Chancery alone remains. The appellate jurisdiction of the council in general early was yielded to the House of Lords, but an appellate jurisdiction remained in matters not of common law. For a time it was exercised in ecclesiastical and admiralty matters by the Court of Delegates (*y*), and finally came to be vested in the judicial committee of the Privy Council with regard to ecclesiastical matters, and in the Court of Appeal with regard to admiralty matters.

**The Procedure of the Council.**—In civil and criminal matters the jurisdiction of the council was generally brought into play upon petition for redress for wrongs where the ordinary course of justice failed to supply an adequate remedy. But the council also was concerned with suits where royal rights were involved, and with control of disaffection of all kinds. Matrimonial causes, land disputes, and mercantile disputes could be considered, and a series of statutes accorded recognition to its jurisdiction (*z*). It could accord relief outside the powers or procedure of the common law Courts, such as maritime and ecclesiastical cases and causes of aliens.

The new methods of procedure used by the council may be enumerated as follows (*a*):—

- (1) Commissions of Oyer and Terminer, to take a verdict and arrest thereafter, were freely used from Henry III. and Edward I.
- (2) Writ of Privy Seal, *quibusdam certis de causis*, addressed to the defendant, found as early as 1346, and by 1363 a *subpcena* clause was usually added.
- (3) Præmunire Writs (since the first Statute of Præmunire, 27 Edw. III. st. 1, c. 1) to the sheriff to warn the defendant to appear. These writs gave no indication of the exact ground of summons, though no doubt the defendant would normally know the cause, and elasticity existed as against the formalism of the common law.
- (4) Bail (first found temp. Richard II.), which might be required from possible offenders, and was very freely used.
- (5) Writ of *ne exeat regno* (formerly used to restrain fraudulent debtors from absconding).
- (6) Commissions of arrest, issued to the sheriff and justices or others, directing them to arrest the wrong-doer in cases of disobedience to the council's orders.

(*y*) Previously to the establishment of the Court of Delegates (25 Hen. VIII. c. 19), ecclesiastical appeals in certain matters were heard by the King in Council, the first statute of Præmunire (27 Edw. III. st. 1, c. 1) having forbidden appeals to the Papal Court, and directed them to be brought before the King in Council.

(*z*) 38 Edw. III. st. 2, c. 1; 12 Ric. II. c. 10; 13 Hen. IV. c. 7; 2 Hen. V. st. 1, c. 8; 31 Hen. VI. c. 2. See Tanner, *Tudor Const. Doc.*, pp. 225–248; *Const. Doc. of James I.*, pp. 128–139.

(*a*) See Carter, *H. E. L. I.*, ch. xiii.; Baldwin, *The King's Council*, pp. 262–306. Procedure by petition in French or English is characteristic of conciliar procedure as opposed to the common law writ procedure. The council at first used the writs of *Exchequer* and *Chancery*, such as *scire facias*, *venire facias*, *monstravit* or *corpus cum causa*.

- (7) Proclamations of outlawry, made by the sheriff, promising reward for capture of the wrong-doer.

Once before the council the parties might be put on oath and examined inquisitorially, as in the ecclesiastical Courts.

The council's methods of procedure were unpopular with Parliament and lawyers, being considered uncertain and oppressive; many instances of petitions against the various writs are to be found during the fourteenth century, and various statutes were passed to remedy abuses (b). But there can be little doubt of the value of the jurisdiction as a means of dealing with unruly subjects and redressing wrongs inflicted on poor persons by magnates. The confusion of the Wars of the Roses lessened the value of the council, but under Henry VII. its activities were revived both for administration and jurisdiction.

**The Court of Star Chamber.**—The term Star Chamber (*Camera Stellata* or *Chambre des Estoyers*) occurs first about 1348, and refers to the decoration of a room at Westminster Palace in which meetings of the council were frequently held to exercise the criminal jurisdiction of the King in Council (c) as well as to do much miscellaneous executive business, and to issue proclamations and orders, such as those to impose a censorship of the press. These sittings of the council to exercise criminal jurisdiction became known as the Court of Star Chamber, and in the third year of Henry VII. the Star Chamber Act (d) was passed, which did not create the Court, but constituted a special committee to cope with murders, robberies, and other evils, composed of the chancellor, treasurer, keeper of the privy seal, one bishop, one temporal lord, and the two chief justices, or two other justices in their stead. The lord president of the council was added in the reign of Henry VIII. (e). By the Council Ordinances of 1526, a distinction is drawn between the executive functions of the council, attendant on the King, and the judicial, exercised at Westminster and often called the Court of Star Chamber, and in 1570 the council condemns Sir W. Paulet's attempt to proceed in the Star Chamber after the business had been taken up in the council, while in 1589 it treats the Chamber as virtually a Court.

The chief offences tried by the Court were perjury, forgery, maintenance, riot, fraud, libel, and conspiracy, breaches of royal

(b) See 2 Edw. III. c. 8; 5 Edw. III. c. 9; 25 Edw. III. st. 5, c. 4; 42 Edw. III. c. 3; 17 Ric. II. c. 6. Treason, felony, and freehold issues were denied to the council.

(c) Tanner, *Tudor Const. Doc.*, pp. 249—298; Pollard, *E. H. R.*, xxxvii, 516—539; Scofield, *A Study of the Court of Star Chamber* (1900).

(d) 3 Hen. VII. c. 1. The name is not in the original form of the Act; a later hand has added in the margin *pro camera stellata*. The Act authorises examination on oath and the use of *subpena* and Writ of Privy Seal.

(e) 21 Hen. VIII. c. 20. See Tanner, *Tudor Const. Doc.*, pp. 259 ff. The Court was by no means restricted to those enumerated, and the members of the House of Lords seem at one time to have claimed membership, but to have failed to secure it. The Chancellor normally presided, and sessions were held in public; James I. sometimes sat and delivered judgment, *e.g.*, on Sir T. Lake for defamation (1619); Tanner, *Const. Doc. of James I.*, pp. 140—145. Coke and Bacon agree in praise of the Court, in which both sat. The Court was not used for the trial of Mary, Queen of Scots (1586), who was tried by a special commission under 27 Eliz. c. 1; 1 St. Tr. 1161—1228. For the unfairness of her trial, cf. Hallam, *Const. Hist.*, i, 156—163.

proclamations, misconduct of ministers, and generally such offences as the common law did not take cognisance of. But, when the Star Chamber was abolished in the reign of Charles I., the Act (f) recited that, as the offences triable therein were then all known to the common law, there was no necessity for the Court. Moreover, the Court used freely to proceed by arrest and private examination, not on oath, in the course of which the accused might be condemned on admissions *ex ore suo*, whereas the common law by excluding such evidence was believed to favour the innocent. The Star Chamber also endeavoured to exercise supervision over juries, as in *Sir Nicholas Throckmorton's Case* (1554). Sir Nicholas Throckmorton was tried in the Court of Queen's Bench for high treason, but was acquitted by the jury. The jury were then committed to prison, and eight of them were eventually brought before the Star Chamber and heavily fined (g). The independence of juries was, however, finally established in *Bushell's Case* (1670) (h). The Court was especially severe against libellers, and in 1632, William Prynne, on account of his book, *Histriomastix*, was sentenced by the Star Chamber to be disbarred and deprived of his university degrees, to stand in the pillory and have his ears cut off, to be fined £5,000, and to be perpetually imprisoned without books, ink, or paper (i). In civil matters the council exercised jurisdiction in disputed customs of manors, in cases with many plaintiffs or defendants, or where foreigners were parties, in deceits of merchants, and in cases between corporations, bailiffs, and burgesses, &c. Opinion under the Stuarts resented the growing severity and arbitrary character of the jurisdiction, and all the jurisdiction of the council and kindred Courts was abolished in 1641 (k).

**The Court of Requests.**—This Court was another branch of the King's Council, dating perhaps from 1493, and from 1550 controlled by two expert Masters of Requests; it was fixed at White Hall by Wolsey. It took over some portion of the civil jurisdiction of the council, hearing complaints of poor men and of persons of the King's household. Its jurisdiction was largely equitable, its procedure by civil law methods, it used, like the council, writs of privy seal, and the Court was extremely popular as affording a cheap and easy remedy for small suits not sufficiently important to be brought in the Court of Chancery itself. In Elizabeth's reign it came into collision with the Courts of Common law, who considered its jurisdiction illegal (l), and endeavoured to restrain its exercise by the writs of prohibition and *habeas corpus*. The attack, inspired in part by interest in fees, was based on the view that the Court rested neither on royal grant, nor on statute, nor on immemorial custom, ignoring, as in the case of the Star Chamber, its clear descent from the council; but the masters were not of the council, a fact obscuring the connection.

(f) 16 Car. I. c. 10.

(g) 1670, 6 St. Tr. 999.

(h) 16 Car. I. c. 10.

(i) Stephen, *Hist. Crim. Law*, i, 326 ff.

(j) 1632, 3 St. Tr. 562.

(l) *Stepney v. Flood* (1598), Coke, *Inst.*, iv, 9, fo. 97; I. S. Leadam, *Select Cases in the Court of Requests* (1898); Tanner, *Tudor Const. Doc.*, pp. 299—312.

In 1641 the original jurisdiction of the council was abolished (*m*); the Court of Requests, however, remained until the outbreak of the civil war in 1642, when it died a natural death. After the Restoration, Charles II. did not attempt to restore it.

**The Court of Chancery.**—*Rise of Chancery* (*n*).—As we have seen, the Chancellor derived his authority originally from delegation from the King rather than from the council, but he often was commissioned to act with it in important matters. Sometimes he was associated with the judges, and only gradually did he come to exercise a purely personal jurisdiction; Nicholas Bacon (1558—79) was the first professional lawyer to hold office. From his early connection with the King he exercised jurisdiction in connection with writs directly affecting the interests of the Crown, but this became of mean importance as compared with his jurisdiction in private causes when that was developed on lines diverging from the common law; thus the Chancellor had a common law as well as his new equity jurisdiction. The distinction of Chancery and council begins to become clearer under Edward III.; the council begins to deal with criminal issues especially, the Chancellor with property questions, which suited better the more formal procedure of the Chancery. From 1331 juries ceased to be used in Chancery, and issues went to King's Bench.

The origin of equity seems to be simply in the fact that the King's justice naturally included considerations of equity, and that it would normally have developed in the common law Courts, had they not in the fourteenth century developed a marked formalism, in part as a result of their dissociation from constant royal and conciliar intervention. The Statute of Northampton in 1328 (2 Edw. III. c. 8) forbade interference with the common law by writs under the great or privy seal, and required the judges to ignore such interference. But the advantage of independence was counterbalanced by the fact that the Courts felt unable to depart from the common law, and in 1340—50 declare that they cannot change ancient usages, and statutes are to be taken strictly, even if an innocent man thus cannot be released or a creditor loses his claim by manipulation of procedural rules. The Chancellor thus represents the exercise and, of course, development of a power inherent in the Crown, whose operation the hardening of common law rules and the growing conservatism of the now distinct Courts of that law hindered. This view may be supported by signs that the common law Courts at one time used methods later peculiar to equity, and that there are some traces of equitable doctrines in the work of the justices in eyre. It is significant that equity spread to the seignorial Courts, was given effect in the Courts for Wales and the Marches, in the Mayor's Court in London, in the Court of equity in the cinque ports, and is found in the Chancery Courts of the Palatinates of Durham and Lancaster.

(*m*) 16 Car. I. c. 10.

(*n*) Spence, *Equitable Jurisdiction of the Court of Chancery*; Wilkinson, *Const. Hist. of 13th and 14th Cent.*, pp. 196 ff. On the question of the relation between common law equity and that of the Chancery, see Plucknett, *Hist. Common Law*, pp. 604 ff.; Hazeltine, *Essays in Legal History* (ed. Vinogradoff), pp. 261 ff.; Adams, *Yale L. J.*, xxvi, 550 ff., as against Holdsworth, *ib.* 1 ff.

*Equity Jurisdiction.*—The jurisdiction thus developed by the Chancellor extended to such matters as “uses,” introduced in the reign of Edward III., which he enforced as being binding on the conscience, and which the other Courts would not recognise, fraud, force, accident or mistake, unfair or inequitable transactions, covenants, agreements, and declarations of trust, and the guardianship of infants and care of their property, though this aspect of his authority was held to rest on a delegation of the Sovereign’s prerogative as *parens patriæ* and not of his judicial power. To the Court of Chancery is also due the doctrine of *specific performance* of contracts; and its ability to take accounts led to its control of partnerships, suretyship and administration of estates. Mortgagors and married women received its protection.

*Procedure.*—The Chancellor made use of the following writs: (1) The writ of *quibusdam certis de causis* or of *subpœna*, by which a person was ordered to attend before the Chancellor. In case of disobedience the *commission of rebellion* was issued (o); (2) the *præmunire* writ, which commenced with the words, *quibusdam certis de causis*, and the writ *venire facias*, directed to the sheriff bidding him cause the defendant appear; (3) writ of *scire facias*, to repeal letters patent (this rested on the common law jurisdiction; the writ was also used to cause the sheriff to procure the defendant’s presence); (4) writ of *corpus cum causa*, used in cases of a complaint of unlawful imprisonment. The Chancellor could not, like the common law Courts, issue writs of execution, but acted in all cases *in personam*; that is to say, in cases of disobedience to a decree, the delinquent was punished by attachment and committal as for a contempt, until he submitted to the decree. The *commission of sequestration*, by which a person’s lands were sequestered, was as early as 1600 in use and was far superior to the common law writ of execution. As in the council procedure began with bill, not writ; there were written pleadings, no issue; precedents were not at first binding, and there was no jury, points differing from common law procedure.

The system of administering *interrogatories*, or making the defendant answer questions on oath, was freely used in the Chancery as also by the council in the Exchequer, whilst at common law the parties themselves were not even competent witnesses until 1851 (p). Though the common law made some use of the prohibition of waste, the use of the *injunction* was also due to Chancery, and this seems to have first been introduced about the reign of Henry VI. It was principally in connection with the use of *injunctions* that the Courts of common law came into collision with the Chancery, and it was specially used to prevent persons taking advantage of their strict common law rights in matters connected with mortgages and trusts, in which the Court of Chancery eventually acquired a monopoly. The method adopted by Chancery was to issue an injunction restraining a person from bringing a suit at common law, or to prevent his

(o) The writ of *subpœna* is said (Rot. Parl. iv. 84) to have been introduced by John Waltham, under Richard II., but this is erroneous, though he issued it under the privy seal and in French. The commission of rebellion is as early as 1594.

(p) 14 & 15 Vict. c. 99.

executing a judgment given in the common law Courts (*g*), and in 1616 occurred the famous battle between Lord Ellesmere, Chancellor from 1603 to 1617, and Lord Chief Justice Coke. Lord Ellesmere issued an injunction to prevent a judgment, obtained before Lord Coke by gross fraud, from being executed. The parties, solicitors, counsel, and even a master in Chancery were then indicted by Lord Coke for having questioned his judgment. The King was called in to settle the dispute, and, having taken the advice of the principal law officers, supported the Chancellor, on the ground, however, of prerogative (*r*). Since 1690, when a bill to restrict injunctions was rejected, the right of Chancery to issue an injunction has not been questioned.

*Equitable System.*—Equitable rules and doctrines were at first ill-defined and without system; they varied, according to Selden, "as if they should make the standard for the measure a Chancellor's foot." Gradually rules and precedents grew up and an equitable system was evolved, such men as Lord Bacon (who succeeded Lord Ellesmere) and Sir Heneage Finch (afterwards Lord Nottingham) (1673—82), doing much to further that end, as also in more modern times Lord Hardwicke (1737—57) and Lord Eldon (1801—6, 1807—27), until at the present day the rules and principles of equity are almost as well ascertained as those of the common law itself. In 1866 Sir G. Jessel, and in 1881 Brett, L.J., expressly disclaimed the power to make new equities, and in 1903, Buckley, J., denied that Chancery was a Court of conscience.

*Composition of the Court.*—Originally the lord chancellor sat sometimes alone, sometimes with the lords of the council, especially from 1600, and later on he was assisted by the master of the rolls, the chief of the masters in Chancery, whose judgments, however, were up to 1851 subject to be discharged or altered by the lord chancellor (*s*). A vice-chancellor was subsequently appointed (*t*), on like terms, but Lord Eldon's sluggishness negatived ready despatch of business, and later on, in 1842, two additional vice-chancellors (*u*), on the equity business of the Exchequer being transferred to the Court of Chancery. In 1851 (*x*) two lords justices of appeal in Chancery were created, who, with the lord chancellor, formed a Court of Appeal in Chancery, from which appeal lay to the House of Lords, and this system prevailed until the passing of the Judicature Acts.

*Lunacy.*—The Chancellor also on behalf of the King was charged with the care of lunatics and their estates, and this jurisdiction has been treated in an exceptional manner and does not belong under the Judicature Acts to the Chancery Division of the High Court. Under the Lunacy Acts, 1890, 1891, and 1922, the Lord Chancellor, Master of the Rolls, and the Lords Justices of Appeal deal with issues of importance as judges in lunacy, but the ordinary jurisdiction

(*g*) See *Courtney v. Glanvil* (1615), Cro. Jac. 343.

(*r*) See Gardiner, *Hist.*, iii, 11; Holdsworth, I, 460—463.

(*s*) See 3 Geo. II. c. 30; and 3 & 4 Will. IV. c. 94, s. 24.

(*t*) 53 Geo. III. c. 24.

(*u*) 5 Vict. c. 5, s. 19.

(*x*) 14 & 15 Vict. c. 83.

is in the hands of a master (*y*). While the Court of Wards (1539—1660) existed, jurisdiction was vested in it.

**The Court of Bankruptcy.**—The Lord Chancellor was under the early Acts as to bankruptcy (*z*) entrusted with power to appoint Commissioners to deal with the estates of bankrupts. In 1831 (*a*) a Court with a Chief and three puisne judges, of whom three were to act as a Court of Review, was instituted; in 1847 the Chief Judge disappeared and the functions of the Court of Review was transferred to a Vice-Chancellor, and in 1851 to the lords justices of appeal in Chancery then created (*b*).

**The Appellate Jurisdiction of the Council.**—After the establishment of the Court of Exchequer Chamber to review errors in the Courts of common law, and the recognition of the House of Lords as the ultimate Court of appeal from the Exchequer Chamber, there still remained to the council appellate jurisdiction in ecclesiastical, admiralty, and lunacy matters, and in appeals from English Courts abroad.

This jurisdiction, as to ecclesiastical and admiralty causes, went to the Court of Delegates on the formation of that Court by Henry VIII. in 1534 (*c*). That Court seems to have been virtually modelled on the existing practice in admiralty under which the council appointed on each appeal a commission to determine the issue, experts in the civil law as opposed to the common law being needed. The Court of Delegates was abolished in 1832, and its jurisdiction restored to the King in Council (*d*), and in the following year to the judicial committee of the Privy Council (*e*). Finally, by the Judicature Act of 1873, so much of the jurisdiction of the Privy Council as related to admiralty and lunacy matters was handed over to the Court of Appeal (*f*), leaving to the Privy Council only so much of the former appellate jurisdiction of the King in Council as relates to ecclesiastical matters and appeals from British Courts overseas, and prize appeals from all Courts.

### *The Courts of Common Law.*

**The King's Bench and Common Pleas.**—The King's Bench, originally distinguished by its attendance on the royal person whence its rolls were styled *coram rege*, seems under Edward III. (*g*)

(*y*) 53 Vict. c. 5; 54 & 55 Vict. c. 65, s. 27; 12 & 13 Geo. V. c. 60, s. 1. The Lord Chancellor may authorise any officer of the Master to exercise jurisdiction: 23 & 24 Geo. V. c. 36, s. 8.

(*z*) 34 & 35 Hen. VIII. c. 4; 13 Eliz. c. 7.

(*a*) 1 & 2 Will. IV. c. 56.

(*b*) 10 & 11 Vict. c. 102; 14 & 15 Vict. c. 83, s. 7. The Act of 1847 established for the benefit of non-mercantile persons a Court for the Relief of Insolvent Debtors, which disappeared under 24 & 25 Vict. c. 134, with the abolition of the distinction between traders and non-traders as liable to bankruptcy.

(*c*) 25 Hen. VIII. c. 19; 1 Eliz. c. 1.

(*d*) 2 & 3 Will. IV. c. 92.

(*e*) 3 & 4 Will. IV. c. 41.

(*f*) Judicature Act, 1873, s. 18, now Judicature Act, 1925, s. 26.

(*g*) Edward III. seems not to have sat personally in Court; Edward IV. sometimes sat; James I. wished to sit and judge, as he did freely in the Star Chamber, but the judges informed him that he could not deliver an opinion: Blackstone, Comm., iii, 41.

to have become more or less clearly distinguished from the Council, and fixed, like the Common Pleas, at Westminster. It was constituted, like that Court, of a chief justice and three puisne judges, to whom a fourth was added in 1830 and a fifth in 1868, and originally its jurisdiction was confined to crimes amounting to a breach of the King's peace (*infractio pacis regis*), and to matters of which the other Courts did not take cognisance. It soon, however (c. 1450), began to encroach upon the jurisdiction of the Common Pleas by a method of procedure known as the *Bill of Middlesex* (*h*), which alleged trespass *vi et armis*, and therefore breach of the King's peace, against the defendant in Middlesex, and upon this charge he was brought before the Court by the sheriff, for unlike the Common Pleas, the Court had the writ *capias ad respondendum*, under which the sheriff arrested the defendant; once before the Court, he could be sued for debt or upon any other charge. If the defendant was not in Middlesex, the writ of *habeat* (*i*) was issued to the sheriff of the county where he was to be found, based on a supposed *Bill of Middlesex*.

At first the defendant was retained in the custody of the Court, but later on appearance or bail was sufficient. As the Common Pleas lost business in this way it secured a statute of Charles II. (*k*) enacting that the true cause must be expressed or the person arrested could give bail in a sum not greater than £40. To meet this an *ac etiam* clause was added to the writ which gave the real charge, and this continued until the Uniformity of Process Act (2 Will. IV. c. 39), which reduced all processes to the same form, but confirmed the jurisdiction of the King's Bench, in civil actions (*l*). Besides its jurisdiction in criminal and civil actions, the King's Bench exercised jurisdiction over the other Courts by means of the following writs:—

- (1) *Mandamus* lay to an inferior Court, person, or corporation, directing them to do some act appertaining to their duty or office, as in the case of a delay of justice in an inferior Court (*m*). An order *nisi* was made, and on the return to the writ the other side might show cause why it should not issue. The penalty for disobedience to the writ was attachment and committal for contempt.
- (2) The writ of *Prohibition* was directed to the judge or parties in an action in any inferior Court, commanding them to desist from further proceedings on the ground that the cause did not belong to the jurisdiction of that Court (*n*); an order *nisi* was made, might be made absolute, and it was enforced by the same penalties as *mandamus*. Prior

(*h*) So called because the Court sat in Middlesex.

(*i*) For examples of these writs, see Blackstone, vol. iii, App. iii.

(*k*) 13 Car. II. st. 2, c. 2.

(*l*) The corresponding writ used by the Common Pleas was that of *quare clausum fregit*, which contained a *nec non* clause corresponding to the *ac etiam* clause. By statute also was obtained the power of arrest on writ of *capias* on mesne process in this Court.

(*m*) See Bl. Comm., iii, 103. Cf. *R. v. Bank of England* (1780), 2 Dougl. 506.

(*n*) Bl. Comm., iii, 105.

to the Judicature Acts the only means of appeal was in ecclesiastical causes under the *statutum de consultatione* (o).

- (3) The writ of *Certiorari* could be issued from King's Bench or Chancery to judges of any inferior Court, or to any other authority acting quasi-judicially, *e.g.*, the sheriff or coroner, commanding them to send the proceedings into the King's Bench. The subject obtained this writ at the discretion of the Court in judicial proceedings chiefly on the following grounds: (i) that an impartial trial could not be had elsewhere; (ii) that important questions of law were involved; (iii) that a special jury was required to try the case.

These writs were a specific development in the Tudor period.

- (4) The writ of *Error* issued from the King's Bench to an inferior Court, some error of law or fact being alleged on the face of the pleadings. Error lay from the Common Pleas to the King's Bench, but the Exchequer refused to send their record on writ of error to the King's Bench in the time of Edward III. The Chancellor and Treasurer with judges were therefore authorised to review errors in the Exchequer (p) and finally it was enacted in 1830 that error on any judgment in the King's Bench, Common Pleas, or Exchequer was to go to the Court of Exchequer Chamber to be heard by the judges of the other two Courts, and thence to the House of Lords (q). After the Judicature Act, 1873 (r), appeal lay to the Court of Appeal, and the writ applied only to criminal cases where there was some error in law apparent on the face of the record, where on the fiat of the Attorney-General it issued from the Crown Office to the Court (s). It was abolished by the Criminal Appeal Act, 1907 (t).

**The Exchequer.**—The Exchequer gradually developed a distinct jurisdiction, though the barons for a long time were primarily revenue officers, with the exception of the Chief Baron, who under Henry IV. and later was often the Chief Justice of the Common Pleas. The barons were only placed on a footing of equality with the other justices in 1579; a fourth was added in 1830, the fifth in 1868. Its acquisition of jurisdiction at the cost of the Common Pleas in cases of debt took place by the use of the writ *quo minus* based on the fiction that, A. being indebted to B., he was thereby the less able to pay the debt to the King. The Exchequer also developed as equitable jurisdiction

(o) (1296), 24 Edw. I. For the writ of consultation, see Holdsworth, H. E. L., i. App. xii b.

(p) 31 Edw. III. st. 1, c. 12. As noted above, by 27 Eliz. c. 8, certain judgments of the King's Bench were to be reviewed by the judges of the Common Pleas and Exchequer; this was regulated further by 31 Eliz. c. 1, but the right to appeal to Parliament was left as applicable in other cases.

(q) 11 Geo. IV. & 1 Will. IV. c. 70.

(r) 36 & 37 Vict. c. 66, s. 47; Judicature Act, 1925, s. 31 (1). For its history, see *R. v. Wilkes* (1770), 4 Burr. 2550.

(s) As to the issue of the writ to any part of the King's dominions except Scotland, see *R. v. Cowle* (1759), 2 Burr. 855.

(t) See s. 20.

primarily in connection with the King's debtors, but this it lost in 1842 (*u*).

### *The Court of Admiralty.*

**Origin of the Court.**—Maritime law in England was prior to about 1340 dealt with in the Council, or Chancery, or the seaport Courts, or the common law Courts, Henry de Bracton being commissioned in 1267 to try a case of fighting by men at sea; in substance it was the sea law as set out in the customs of Oléron (recorded probably in the twelfth century, but only extant in later versions). The style "Admiral" appears under Edward I., but only under Edward III.'s maritime supremacy after Sluys (1340) does there appear the grant of power to the admiral to hear causes, and in 1360 John Pavely was made captain of the fleet with power to hold pleas (*x*). It is possible that the tract *De Officio Admiralitatis* (*y*) really records the extent of jurisdiction conferred by the King.

At first one or more admirals were appointed, later on a single lord high admiral, his duties with regard to particular districts being delegated to deputies or vice-admirals (*z*). In 1482 we hear of a judge of the Admiralty Court, which by this time had criminal and civil jurisdiction in matters taking place on the high seas, in prize, and over wreck and other droits of the Crown or the Admiralty. In addition to the admiral's jurisdiction there were several seaport towns which had *courts of the seaport* with maritime jurisdiction, either by custom or under Richard II. by express grant. These Courts are much older than the Courts of the admiral, and they administered the common law of the sea, which was akin to the law merchant.

The history of the Admiralty Court is closely connected with the jealousy felt by the common law Courts of its jurisdiction in civil and criminal matters, so that these may be considered separately.

**Criminal Jurisdiction.**—By 1363 the sole jurisdiction on the high seas was recognised as belonging to the Admiralty alone. A statute of Richard II. (*a*) gave the admiral jurisdiction in cases of death and mayhem occurring in "great ships" being in the main stream of "great rivers," beneath the bridges nigh to the sea, but denied it cognisance of matters arising in the bodies of the counties. On the plea that crimes often went unpunished because the Admiral's Court followed the civil law, though originally jury trial seems to have been known (*b*), it was provided in 1536 (28 Hen. VIII. c. 15) that all

(*u*) 5 Vict. c. 5. The jurisdiction dates on the ordinary view from the sixteenth century; but see Baldwin, *The King's Council*, ch. ix.

(*x*) See Carter, *H. E. L. I.*, ch. xvii; Holdsworth, i, 545 ff.; R. G. Marsden, *Select Pleas in the Court of Admiralty* (1894); Baldwin, *op. cit.* pp. 272—275; cf. A. H. Thomas, *Plea and Memoranda Rolls*; *Select Pleas on Law Merchant* (ed. Gross), for the commercial law.

(*y*) *Black Book of the Admiralty*, i, 221. An early printed copy ascribes it to Edward III.

(*z*) Stephen, *Hist. Crim. Law*, ii, 17. There seems to be some doubt whether the first lord high admiral was the Earl of Arundel and Surrey, temp. Richard II., 1386, or Sir Thomas Beaufort, 1408.

(*a*) 15 Ric. II. c. 3. See 13 Ric. II. st. 1. c. 5.

(*b*) Under the civil law, accused persons, if eye witnesses were not available, could be condemned on confession only, which required torture or pains.

treasons and confederacies, felonies, robberies, murders committed on the sea, or in any haven, river, or creek (c), should be tried under the King's commission by the admirals, and "three or four such other substantial persons" appointed by the Lord Chancellor (who were generally common law judges), "after the common course of the laws of this land," that is to say, by a petty jury after indictment by a grand jury in the shire indicated by the commission. In fact convictions were soon increased, though, if there were no witnesses, the reason is not clear. Various statutes regulating the lord high admiral's jurisdiction continued to be passed (d), that of 1799 applying the like procedure to all offences, and eventually in 1834 the Central Criminal Court was empowered to try all offences falling within the Admiralty jurisdiction (e); in 1844 commissioners of *oyer and terminer* and of *gaol delivery* were invested with all the powers of the commissioners under the Act of Henry VIII.; and in 1861 all indictable offences committed at sea within Admiralty jurisdiction are to be deemed the same in character and liability to punishment as though committed in England or Ireland.

Thus the criminal jurisdiction of the admiral has passed to the ordinary Courts. The provisions of the Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict. c. 73), passed in consequence of the decision in *R. v. Keyn* (f), may be noted, under which an offence committed by a foreigner either on a British or foreign ship within one marine league (three miles) of the coast, falls within the admiral's jurisdiction, provided a Secretary of State grants a certificate to that effect. In general the jurisdiction applies to (1) all British subjects on board British ships, whether on the high seas or in foreign ports or harbours (doubtless also in foreign territorial waters) or on board foreign ships to which they do not belong; (2) all persons on British ships on the high seas; and (3) pirates at common law; it has been extended to members of the crew of British ships even on shore in certain cases, even if membership has ceased within three months preceding, a provision necessary to punish depredations by malefactors on the Pacific islands pending establishment of local governments of an effective character.

It may also be noted that the part of the coast between high- and low-water marks falls within the jurisdiction of the common law Courts when the tide is out, and of the Admiralty when the tide is in (g).

**The Civil Jurisdiction.**—The civil jurisdiction of the Admiralty may have developed from delegation by the council from time to time, and in the fifteen century it appears to have included causes arising

(c) This Act is still the main authority for the extent of the Admiralty jurisdiction: and see *R. v. Bruce* (1812), 2 Leach, C. C. 1093.

(d) See 11 & 12 Will. III. c. 3; 39 Geo. III. c. 37; 46 Geo. III. c. 54; 7 Geo. IV. c. 38.

(e) 4 & 5 Will. IV. c. 36; 7 & 8 Vict. c. 2; 24 & 25 Vict. c. 96, s. 115; c. 97, s. 72; c. 98, s. 50; c. 99, s. 36 (now 26 Geo. V. & 1 Edw. VIII. c. 16, ss. 15, 16); c. 100, s. 68. See also Merchant Shipping Act, 1894, ss. 686, 687; *Robey v. Vladimier* (1935), 52 T. L. R. 22.

(f) (1876), L. R. 2 Ex. D. 63. The extent of territorial waters is declared by the Crown: *The Fagernes*, [1927] P. 311.

(g) Stephen, *Hist. Crim. Law*, ii, 26. Cf. *Sir H. Constable's Case* (1601), 5 Co. Rep. 107.

out of matters happening overseas, which could not conveniently be dealt with in the common law Courts. The Statutes of Richard II. of 1389 and 1391, and under Henry VI. (29 Hen. VI. c. 2, and 31 Hen. VI. c. 4), endeavoured to confine Admiralty jurisdiction and were reinforced by 2 Hen. IV. c. 11, imposing double damages if a case were wrongly taken there. Under the Tudors the Court of Admiralty exercised a very wide jurisdiction, covering all mercantile and shipping cases, certain torts committed at sea, collisions, salvage, fishermen, matters as to harbours and rivers. A statute (32 Hen. VIII. c. 14) gave the Admiralty Courts jurisdiction in contracts made abroad, charterparties, insurance, general average, freights, &c. About 1600 a reception of Italian maritime law took place under the prerogative Admiralty jurisdiction. But, despite efforts at accord in 1575 and 1632, and Sir L. Jenkins' conclusive arguments in 1670, the prejudices of Coke prevailed, mercantile interests were ignored, and the Courts of common law came into conflict with the Courts of Admiralty and encroached upon their jurisdiction. Further, the Admiralty Court was not a Court of record (*h*), and, unless the transaction actually took place at sea, prohibition lay to it from the common law Courts. In this way it lost jurisdiction on charterparties, in marine insurance, and in contracts made overseas. In effect it could deal only with torts committed at sea, contracts made and to be executed at sea, disputes between part owners (*i*), process *in rem* on bottomry bonds executed overseas, mariners' wages, forfeitures of ships and cargoes for violation of customs laws (*k*), and enforcement of Admiralty decrees of foreign Courts. For this reason the Admiralty Court fell into disfavour with merchants; therefore the Admiralty Court Acts of 1840, 1854, and 1861 (*l*) were passed, giving the High Court of Admiralty full jurisdiction over all maritime matters, except charterparties, and its proceedings could be either *in rem* or *in personam*. The Court also had jurisdiction in respect of droits of Admiralty, such as wreck, flotsam, jetsam, and lagan, goods recovered from pirates, enemy ships or goods taken in British ports, &c., the profits on which were formerly granted to the Lord High Admiral and now belong to the consolidated fund under the Civil List Acts. The High Court of Admiralty, as constituted by these Admiralty Court Acts, was presided over by a judge, who acted as the deputy of the lord high admiral, and who was the same person as the judge of the Court of Probate (*m*).

By the County Courts Acts, 1868 and 1919 (*n*), jurisdiction in smaller cases was conferred on certain of the County Courts, the local Courts (other than that of the Cinque Ports) having been abolished by the Municipal Corporation Act, 1835.

(*h*) *Thomlinson's Case*, 12 Co. Rep. 104. The King resented the decision and delayed its printing. The Court thus ceased to punish for contempt as it had done in 1594.

(*i*) *Ousten v. Hebden*, 1 Wils. 101.

(*k*) *The Freemason*, Marsden's Adm. Cas., p. 55.

(*l*) 3 & 4 Vict. cc. 65, 66; 17 & 18 Vict. cc. 78, 104; 24 & 25 Vict. c. 10. The office from 1840 was held by the Dean of Arches. For the influence of civil law on the Admiralty, see Senior, L. Q. R., xxxv, 73—83.

(*m*) Established by 20 & 21 Vict. c. 85.

(*n*) 31 & 32 Vict. c. 71; 9 & 10 Geo. V. c. 73, s. 13; now County Courts Act, 1934 (24 & 25 Geo. V. c. 53), ss. 55—57.

Finally, by the Judicature Act of 1873, the jurisdiction of the Admiralty Court was merged in that of the High Court of Justice and has been extended *inter alia* to charterparties by the Administration of Justice Act, 1920, and the Judicature Act, 1925 (o).

The legal system applied in the Admiralty was part of the law merchant, the general maritime law (p).

**Admiralty Appeals.**—In the fifteenth century Admiralty appeals went to delegates or commissioners appointed by the Crown, in accordance with the system of council control of the Admiralty, and in 1534 (q) the Court of Delegates was formed to hear Admiralty and ecclesiastical appeals.

The same Act which destroyed the jurisdiction of the Court of Delegates in ecclesiastical causes destroyed it also in Admiralty causes, namely, 2 & 3 Will. IV. c. 92, by which its jurisdiction was transferred to the King in Council; and finally, by 3 & 4 Will. IV. c. 41, jurisdiction both in ecclesiastical and Admiralty appeals was transferred to the judicial committee of the Privy Council. By the Judicature Act of 1873 the Court of Admiralty was merged in the Probate, Divorce, and Admiralty Division of the High Court of Justice. Appeal lies to the Court of Appeal and thence to the House of Lords.

**Prize Jurisdiction.**—Matters affecting enemy or other property in war naturally belong to the council from which they came before the Court as early as 1357; jurisdiction developed especially after 1589, but from the Commonwealth such issues were dealt with in what was practically a distinct Court (r). The revival of Admiralty Court jurisdiction took place when Lord Stowell enriched English law by an important series of rules of law, based on international practice, during the Napoleonic wars. The Court is bound by international law (s), save if otherwise provided by Act of Parliament as opposed to Order in Council (t). Appeal used to lie to special commissioners, now by 3 & 4 Will. IV. c. 41, to the Privy Council. The Naval Prize Act, 1864, gives jurisdiction throughout the dominions; it is exercised by the Probate, Divorce, and Admiralty Division of the High Court (u).

**Colonial Admiralty Courts.**—These were established, from the seventeenth century (x), under the royal prerogative, or in some cases by statute under the name of *Vice-Admiralty Courts*, to hear causes arising in the colonies, and in 1832, by 2 & 3 Will. IV. c. 51, their

(o) 15 & 16 Geo. V. c. 49, s. 22; 10 & 11 Geo. V. c. 81, s. 5.

(p) See p. 304, *post*.

(q) 25 Hen. VIII. c. 19. The decisions of delegates were to be final under 8 Eliz. c. 5.

(r) Roscoe, *History of the Prize Court*.

(s) Potter, *Grotius Society Transactions*, x, 37.

(t) *The Zamora*, [1916] 2 A. C. 77, 95, 96, overruling Stowell's *dictum*; *The Fox* (1811), 1 Edw. 312—314.

(u) 27 & 28 Vict. c. 25; 54 & 55 Vict. c. 53, s. 4; 15 & 16 Geo. V. c. 49, ss. 23, 56 (3) (b); Prize Courts (Procedure) Act, 1914 (4 & 5 Geo. V. c. 13). See also as to transfer of cases from one prize Court to another, 5 & 6 Geo. V. c. 57, ss. 1—3; 6 & 7 Geo. V. c. 2, s. 2.

(x) Keith, *Const. Hist. of First British Empire*, pp. 261 ff.

jurisdiction was defined as being such matters as fell under the cognisance of the Admiralty Court, viz., collision, salvage, pilotage, bottomry, &c., even if arising outside colonial limits, doubts having arisen on this point. The criminal jurisdiction regarding which doubts have often arisen, was entrusted, as regards piracies, felonies, and robberies only, to commissions proceeding by civil law by 11 Will. III. c. 7, and by 46 Geo. III. c. 54, to commissions analogous to those in England with power in respect of all offences; finally it was ascribed by the Admiralty Offences (Colonial) Act, 1849, to the ordinary Courts. From Vice-Admiralty Courts appeal lay to the Privy Council. By the Vice-Admiralty Courts Act, 1863 (26 Vict. c. 24), governors of colonies were made *ex-officio* vice-admirals, and colonial chief justices were made *ex-officio* judges of the Court. The Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27), provided that all Courts of law in British possessions, having unlimited civil jurisdictions, should be Courts of Admiralty, with jurisdiction equal to that of the High Court in England, and appeal to the Privy Council (*y*). The Dominions have now under the Statute of Westminster full power to deal with Admiralty jurisdiction (*z*), and Canada has abolished under the power then given all restriction of her legislation. Prize jurisdiction could be bestowed on a Vice-Admiralty Court or a Colonial Court of Admiralty by special authority, as was done in the War of 1914—18 (*a*).

(*y*) *The Yuri Maru*, [1927] A. C. 906. The powers given have not been extended to include those added under the Administration of Justice Act, 1920 (10 & 11 Geo. V. c. 81), s. 5; 15 & 16 Geo. V. c. 49, s. 22.

(*z*) 22 Geo. V. c. 4, s. 6. This applies also to prize jurisdiction.

(*a*) 27 & 28 Vict. c. 25; 57 & 58 Vict. c. 39; Prize Courts (Procedure) Act, 1914 (4 & 5 Geo. V. c. 13); Prize Courts Act, 1915 (5 & 6 Geo. V. c. 57); Naval Prize (Procedure) Act, 1916 (6 & 7 Geo. V. c. 2).

## CHAPTER III.

CHANGES IN THE SUPERIOR COURTS UNDER THE JUDICATURE ACTS,  
1873 TO 1925, ETC.*Superior Courts before the Judicature Acts.*

IMPORTANT changes in the judicial institutions of England were introduced by the first Judicature Act (*a*), which came into force on November 1, 1875, by virtue of the Supreme Court of Judicature (Commencement) Act (*b*) of that year.

The superior Courts of first instance up to that date were, briefly, the King's Bench, the Common Pleas, the Court of Exchequer, the Court of Chancery, the Court of Bankruptcy, and the High Court of Admiralty described above. To these must be added the Court of Probate and the Court for Divorce and Matrimonial Causes, created in 1857 to replace ecclesiastical jurisdiction (*c*), and held by the same judge. There were also superior Courts in the Counties Palatine, Lancaster (Common Pleas and Chancery) and Durham (Pleas and Chancellor's Court), and the Court of the Stannaries in the Duchy of Cornwall (*d*). The jurisdiction of that Court was in 1896 handed over to the County Courts (*e*).

*The Supreme Court of Judicature.*

By the Judicature Act, 1873, the former Courts of King's Bench, Common Pleas, Exchequer, Chancery, Probate, and Divorce and Matrimonial Causes were united into the Supreme Court of Judicature. The Supreme Court of Judicature was subdivided into two divisions, namely, his Majesty's High Court of Justice and his Majesty's Court of Appeal. The Court of Bankruptcy remained as a separate Court until the Bankruptcy Act of 1883 (*f*), when it became part of the Supreme Court, its jurisdiction being merged in that of the High Court. The Chancery Courts of Lancaster and Durham were left untouched by the Judicature Acts, but the jurisdictions of the Court of Common Pleas at Lancaster and of the Court of Pleas at Durham were merged in that of the High Court.

The Supreme Court of Judicature (Consolidation) Act, 1925 (*g*), consolidates into one statute not only the Judicature Acts, 1873 to 1910, and parts of the Administration of Justice Acts, 1920 and

(*a*) 36 & 37 Vict. c. 66.

(*b*) 37 & 38 Vict. c. 83, s. 2; and see 38 & 39 Vict. c. 77, s. 2, and the App. Jur. Act, 1876, s. 24.

(*c*) See 20 & 21 Vict. c. 77 (Probate); c. 85 (Divorce).

(*d*) See p. 302, *post*.

(*f*) 46 & 47 Vict. c. 52, ss. 92 ff.

(*e*) 59 & 60 Vict. c. 45.

(*g*) 15 & 16 Geo. V. c. 49.

1925, but also the Matrimonial Causes Acts and various sections of the Probate Court Acts and parts of the Administration of Estates Act, 1925, dealing with probate practice and jurisdiction, and, generally speaking, all statutes dealing with the jurisdiction and practice of the Supreme Court. The jurisdiction in Lunacy (*h*) is not dealt with, and ss. 25 (2), 46, 64 and 66 of the Judicature Act, 1873, are not repealed by this Act.

*His Majesty's High Court of Justice.*

**Constitution.**—The High Court of Justice, under the Act of 1873, comprised the following divisions:—

- (1) The Chancery Division, consisting of the lord chancellor as president, the other judges being the master of the rolls and the three vice-chancellors. The master of the rolls became a permanent judge of the Court of Appeal by the Judicature Act, 1881 (s. 2), and has therefore ceased to act as a judge of the Court of Chancery; whilst the vice-chancellors have been replaced by those judges of the High Court who are attached to the Chancery Division, and who are now six in number.
- (2) The King's Bench Division, consisting of the lord chief justice of England and some of the former justices of the King's Bench.
- (3) The Common Pleas Division, consisting of the lord chief justice of the Common Pleas as president, with some of the former justices of the Common Pleas. To this division was assigned the jurisdiction exercised by the former Court of Common Pleas, of the Court of Common Pleas at Lancaster, and of the Court of Pleas at Durham.
- (4) The Exchequer, consisting of the lord chief baron of the Exchequer, and some of the former barons of the Exchequer.
- (5) The Probate, Divorce, and Admiralty Division, consisting of the former joint judge of the Court of Probate and of the Court of Divorce and Matrimonial Causes as president, with the judge of the former Court of Admiralty or his successor. To this division is assigned the jurisdiction of the former Courts of Probate, of Divorce and Matrimonial Causes, and of the Court of Admiralty.

By Order in Council of December 16, 1880, the King's Bench, Exchequer, and Common Pleas Divisions were amalgamated into the King's Bench Division of the High Court of Justice. The lord chief justice of England is the president, and the powers of the former chief justice of the Common Pleas and of the chief baron of the Exchequer (these two offices being abolished by the Order) were vested in him. Under the Judicature (Consolidation) Act, 1925 (*i*), the High Court of Justice, therefore, now comprises three divisions—

- (1) The Chancery Division, consisting of the lord chancellor as president and six other judges.

(*h*) See p. 253, *ante*.

(*i*) 15 & 16 Geo. V. c. 49, s. 4.

- (2) The King's Bench Division, consisting of the lord chief justice of England as president and nineteen other judges in 1939, the number having been made up. The Supreme Court of Judicature (Amendment) Act, 1935, requires addresses from both Houses of Parliament before any vacancy is filled when there are seventeen judges or over, but no further address is needed for a vacancy occurring within a year of such an address.
- (3) The Probate, Divorce, and Admiralty Division, consisting of the president and four other judges (1 Geo. VI. c. 2).

The puisne judges are styled "Justices of the High Court."

Any ordinary judge of the Court of Appeal appointed after July 29, 1938, may be required to act as a judge of the High Court by the lord chancellor, with the consent of the lord chief justice or president of the Probate, Divorce and Admiralty Division, under the Supreme Court of Judicature (Amendment) Act, 1938 (s. 2).

**Jurisdiction.**—To the Chancery Division the Judicature Act, 1873, and now the Judicature Act, 1925 (*k*), especially assigned jurisdiction in the following causes and matters, in addition to the exclusive jurisdiction which is already possessed by statute:—

Administration of the estates of deceased persons.

Dissolution of partnerships, or the taking of partnerships or other accounts.

Redemption and foreclosure of mortgages.

Raising of portions or other charges on land.

Sale and distribution of property subject to any lien or charge.

Execution of trusts, charitable or private.

Rectification or cancellation of deeds or other written instruments.

Specific performance of contracts with regard to realty, including leases.

Partition or sale of real estates.

Wardship of infants, and the care of infants' estates.

All causes and matters which under any Act for the time being in force are assigned to that division (*l*).

To the King's Bench Division is assigned the former jurisdiction of the Court of King's Bench, of the Court of Common Pleas at Westminster, and of the Court of Exchequer (*m*).

Prior to 1939, the criminal jurisdiction of the King's Bench Division was in practice restricted to the trial of indictable offences committed in London or Middlesex; cases where by *certiorari* removal has taken place from assizes or quarter sessions; where an information *ex officio* is laid by the Attorney-General or through the Master of the Crown Office at the order of the High Court; where there has been neglect of duty by an official as to issue of writs for election to the Commons, or where oppression has been committed by governors or officers in the colonies and India; in these cases and that of oversea treason

(*k*) 15 & 16 Geo. V. c. 49, s. 56.

(*m*) *Id.*

(*l*) 15 & 16 Geo. V. c. 49, s. 56.

indictment before a grand jury of London and of Middlesex still is preserved (*n*).

The Administration of Justice (Miscellaneous Provisions) Act, 1938, by s. 11, provides that only by direction of the High Court shall any inquisition or indictment be tried at bar, except in the cases enumerated in the Act of 1933; but the Court may order the excepted cases to be tried at the Central Criminal Court, and may order any other indictment or inquisition to be tried there before three judges of the King's Bench Division. That Court has long dealt normally with indictments.

The Act also authorises the Court to direct the trial of any indictment or inquisition at a different Court of assize or quarter sessions to that normal.

To the Probate Division is assigned the former jurisdiction of the Court of Probate, the Court for Divorce and Matrimonial Causes, the Court of Admiralty and the Prize Court.

In December, 1933, the Business of Courts Committee suggested the extinction of the Probate, Divorce, and Admiralty Division, the probate business going to the Chancery Division, the other work to King's Bench; the abolition of Divisional Courts, all appeals from County Courts and inferior Courts to be taken to the Court of Appeal; and the cessation of creating new Lords Justices of Appeal, extra High Court judges being appointed in lieu, and all such judges being made eligible to sit as members of the Court of Appeal. But these proposals have not so far received general approval, though County Court appeals have been assigned to the Court of Appeal, and the change as to judges set out above has been made.

By rules of Court provision has been made under which commercial causes are dealt with by a judge assigned to that work, and parties to causes may have their cases disposed of under a simplified procedure, including by consent exclusion of all appeal, or limitation to the Court of Appeal, or to appeal on a point of law only. (R. S. C., Ord. XXX., as amended in 1937).

**Rules of Law.**—These rules enacted by the Judicature Act, 1873, s. 25, are repealed and replaced by the Law of Property Act, 1925, and are as follows:—

An estate for life without impeachment of waste is not to confer upon the tenant the right to commit *equitable waste*, unless such an intention expressly appears by the instrument creating the trusts (*o*).

There is not to be any merger by operation of law only where the beneficial interest would not be deemed to have merged in equity (*p*).

A mortgagor entitled to possession or the receipt of the rents and profits may sue for such possession or the recovery of the rents and profits in his own name without joining the mortgagee (*q*).

(*n*) 23 & 24 Geo. V. c. 36, s. 1 (4); 35 Hen. VIII. c. 2 (treason); 11 Will. III. c. 12; 42 Geo. III. c. 85; 1 & 2 Geo. V. c. 28 (officials); 5 & 6 Geo. V. c. 61 (India) 53 Geo. III. c. 89 (election writs). Of these Acts, 5 & 6 Geo. V. c. 61, is repealed by 25 & 26 Geo. V. c. 42.

(*o*) Replaced by s. 135 of the Law of Property Act, 1925.

(*p*) Replaced by s. 185.

(*q*) Replaced by s. 98.

An absolute assignment in writing of any debt or legal chose in action, of which notice in writing shall have been given to the debtor or other person from whom the assignor would have been entitled to claim, shall pass and transfer the legal rights to such a debt or chose in action, and enable the assignee to give a good discharge for the same (*r*).

Stipulations in contracts as to time or otherwise which would not, before the passing of the Act, have been considered in equity as of the essence of the contract, are to have the same construction and effect in all Courts as they would have received in equity (*s*).

Generally it was enacted by the Judicature Act, 1873, that law and equity are to be concurrently administered in every Court, and that where the rules of law and equity clash the latter are to prevail. Remedies and defences which had hitherto been appropriate only in the Court of Chancery may now be given effect to in either division (*t*).

Provision is made by the Administration of Justice (Miscellaneous Provisions) Act, 1933, for the summary determination by the High Court of any application by a person concerned to determine his liability in respect of death duties.

From September 1, 1933, in civil proceedings (including petitions of right and proceedings by the Crown in the High Court or a County Court for the recovery of fines or penalties) to which the Crown is a party, and in any arbitration, the costs are in the discretion of the Court or arbitrator in the same manner as in cases between parties; but, where a government department is required to be made a party, the Court or arbitrator may order any other party to pay the Attorney-General's costs, whatever the result of the proceedings. The Crown is not to be deemed a party to proceedings because the Attorney-General proceeds on the relation of some other person (*u*).

### *The Assizes.*

As we have already seen, the circuit system, instituted by Henry I., and improved upon by Henry II. in 1166, eventually superseded the old justices in eyre, and Edward I. definitely provided that the commissioners should be appointed out of the King's sworn justices (*x*). Eventually by the Judicature Acts, 1873 and 1875, the Crown was

(*r*) Replaced by s. 136 of the Law of Property Act, 1925.

(*s*) Replaced by s. 41. Cf. for the principle, *Dominion Building Corp'n. v. R.*, [1933] A. C. 533.

(*t*) 15 & 16 Geo. V. c. 49, ss. 36—38, 44.

(*u*) 23 & 24 Geo. V. c. 36, ss. 3, 7. The Act (s. 5) provided that it might be ordered that procedure by order *nisi* should cease in regard to the prerogative writs of *certiorari*, *mandamus* or prohibition, but that leave must normally be obtained before application was made for an order absolute, and that the procedure to compel justices or county Court judges to perform duties should be assimilated to *mandamus*. It was provided by the County Courts Act, 1934 (24 & 25 Geo. V. c. 53), ss. 111—115, that proceedings in *certiorari* or prohibition shall be summary, and a simple order replaces *mandamus*. By 1 & 2 Geo. VI. c. 63, s. 71, orders of *mandamus*, prohibition and *certiorari* supersede the old writs, though leave is normally necessary before such orders are applied for (s. 10). *Mandamus* is made applicable to require justices or officers of County Courts to do any duty or to require a Court of summary jurisdiction or Quarter Sessions to state a case (s. 8), and an injunction replaces an information in the nature of *quo warranto* (s. 9).

(*x*) 13 Edw. I. st. 1, c. 30. See p. 242, *ante*.

empowered to issue commissions of assize, oyer and terminer, and gaol delivery to any judges of the High Court of Justice, or to serjeants-at-law (no longer appointed) or king's counsel (*y*), and by the Judicature Act, 1925, s. 70, County Court judges may be included in the commission.

At the present day the various circuits are regulated principally by various Orders in Council, made under the authority of the Judicature Act, 1925 (*z*). To summarise the existing system, which is regulated principally by Order in Council, there are at the present day eight different circuits, viz., the Northern, the South-Eastern, the North-Eastern, the Midland, the Oxford, the North Wales and Chester, the South Wales, and the Western. To some of the circuit towns two judges are sent down, to others one only, according to the amount of business to be transacted. On all the circuits summer (May), autumn and winter assizes are held (*a*), and in Manchester, Liverpool, and Leeds, Easter assizes may also be held. The circuits themselves, or any of them, may be altered or discontinued by Order in Council, as also the towns at which the assizes are held (*b*). There are variations as to whether criminal or civil and criminal business is taken, and as to the number of times assizes are held in the several towns.

**The Commissions of Assize.**—The various commissions of assize were as follows:—

- (1) Criminal, viz., of the *peace*, of *oyer and terminer*, and of *general gaol delivery*.
- (2) Civil, viz., *assize* and *nisi prius*.

Previously to the invention of the *nisi prius* writ civil causes, triable by the High Court, had to come up to Westminster. The writ of *nisi prius* provided that they should still do so, unless before (*nisi prius*) the day appointed for trial the judges of assize should visit the county. By the Common Law Procedure Act, 1852 (*c*), the trial may be held before the judges of assize without any proviso of *nisi prius*.

The judges now sit under three commissions: (1) *general gaol delivery*, under which the gaols are cleared of all persons awaiting trial; (2) *oyer and terminer*, under which cases in which the grand jury have returned a true bill were tried; but in 1933 grand juries disappeared at assizes; (3) *assize*, under which civil cases are taken, and to this the commission of *nisi prius* was annexed by the Statute of Westminster the Second (*d*). By a statute of Edward III. justices of assize were also to be commissioners of oyer and terminer (*e*); the commission of assize by itself therefore now includes the other commissions.

(*y*) Judicature Act, 1873, s. 37; Judicature Act, 1875, s. 8; and see Appellate Jurisdiction Act, 1876, s. 15.

(*z*) 15 & 16 Geo. V. c. 49, s. 72. The amalgamation of the Welsh circuits was recommended by the Business of Courts Committee.

(*a*) Some of the circuit towns are only visited at the summer and winter assizes. See Judicature Act, 1925, s. 83.

(*b*) Judicature Act, 1925, s. 77.

(*c*) 15 & 16 Vict. c. 76.

(*d*) 13 Edw. I. st. 1, c. 30.

(*e*) 2 Edw. III. c. 2. The commission of *general gaol delivery* had been previously added (27 Edw. I. st. 1, c. 4).

By the Judicature Act, 1925, a judge sitting on assize is now to be deemed to constitute a Court of the High Court of Justice (*f*), and therefore *mandamus* no longer lies to him as perhaps it did formerly (*g*). The Act makes provision for the trial of matrimonial causes at assizes (*h*) and for the regulation of circuits, power being given to dispense with assizes in places where they are unnecessary and with the attendance of jurors where no business arises (*i*).

The circuit system has often been criticised on the score of the want of business in many towns, the waste of judicial time in travelling, and the resulting congestion and delay in the Courts in London. On the other hand, it is a clear advantage to have matrimonial causes dealt with locally, even at the risk of some laxity, for instance, in the use of judicial discretion. It is clearly not a jurisdiction suitable for exercise by County Courts.

### *Courts of Appeal before the Judicature Acts.*

These Courts were:—

- (1) The Court of Exchequer Chamber, which heard appeals from the common law Courts, including those of Lancaster and Durham.
- (2) The Court of Appeal in Chancery, which heard appeals from Chancery, the Chancellor of Durham, and the Bankruptcy Court, while Lancaster had a special Court of Appeal in Chancery.
- (3) The full Court of Divorce, which heard appeals from the Court of Probate and the Court of Divorce and Matrimonial Causes.
- (4) The judicial committee of the Privy Council, to which appeals lay from the Admiralty Court, from the Channel Islands and all British Courts abroad, and appeals in lunacy and ecclesiastical causes.
- (5) The House of Lords, which was the ultimate Court of appeal from all the above Courts, except the Privy Council, from which there was no appeal.

### *Courts of Appeal since the Judicature Acts.*

Both divisions of the Supreme Court of Judicature enjoy certain appellate jurisdiction under the Acts, and these, with the Court of Criminal Appeal established in 1907, the House of Lords and the Privy Council, will now be considered under the following sub-headings.

**The High Court of Justice as a Court of Appeal. The Divisional Court.**—In all cases where there is a right of appeal from any inferior Court (*viz.*, petty and quarter sessions, and in certain causes in the

(*f*) Judicature Act, 1925, s. 70 (4), re-enacting Judicature Act, 1873, s. 29.

(*g*) *Cf. R. v. Harland*, 8 A. & E. 826.

(*h*) See Matrimonial Causes at Assizes Order, 1937 (S. R. & O., 1937, No. 1173), and Matrimonial Causes Rules, 1937, ss. 31, 32, and App. III. (*ib.* No. 1113, pp. 2112 *f*).  
*Cf.* the proceedings in Mrs. Simpson's divorce, discussed by the President, as reported in *The Times*, March 20, 1937.

(*i*) *Ss.* 70—83.

Mayor's and City of London Court) or person to the High Court of Justice, the appeal is to be brought in a divisional Court of the High Court of Justice. The decision of the divisional Court is final unless leave to appeal is given by that Court or the Court of Appeal (*k*). In cases where the decision of the High Court or its predecessor, the superior Court, is by statute declared to be final, the right to appeal from the divisional Court is absolutely barred (*l*). This provision embraces all criminal matters in which appeal lies to the High Court, whose decision was by the Judicature Act, 1873, declared to be final, except in cases of error of law apparent upon the record (*m*).

A divisional Court is constituted of two judges of the High Court (*n*), or more if the president and two other judges of the division consider it necessary (*o*). Any judge of the High Court sitting in the exercise of its jurisdiction elsewhere than in a divisional Court may reserve any case, or any point in a case, for the consideration of a divisional Court, or may direct any case or point in a case to be argued before a divisional Court (*p*).

**The Court of Crown Cases Reserved.**—This Court had its origin in the practice under which a judge could in case of doubt respite judgment or sentence in order to discuss the issue with other judges, the final disposal of the prisoner depending on the result. A formal Court was created by the Crown Cases Act, 1848 (11 & 12 Vict. c. 78), to settle difficult points of law arising in criminal trials and specially reserved for the decision of that Court; cases could be reserved for it at quarter sessions. The decision of the Court was final except in case of error of law apparent upon the record, and as to which no question had been reserved (*q*). The Court was composed of five or more judges of the High Court, of whom the lord chief justice was normally one (*r*).

The jurisdiction of the Court in relation to cases stated on a point of law arising in criminal trials under the Crown Cases Act, 1848, and the Judicature Act, 1873, has now been transferred to the Court

(*k*) Judicature Act, 1925, s. 31 (f). The abolition of such appeals, with the substitution of the Court of Appeal as the Court to deal with such appeals, in order to simplify jurisdiction, was recommended by the Business of Courts Committee (December, 1933), and carried out as regards appeals from County Courts by the Administration of Justice (Appeals) Act, 1934 (24 & 25 Geo. V. c. 40), s. 2; County Courts Act, 1934 (24 & 25 Geo. V. c. 53), s. 105. The rule applies to causes under £100 in the Mayor's and City of London Court and to those in which the Exchequer Chamber would have had jurisdiction in error: *Bowater & Sons, Ltd. v. Davidson's Paper Sales, Ltd.*, [1936] 1 K. B. 465, and was extended generally to most causes by 1 & 2 Geo. VI. c. 63, s. 15.

(*l*) Judicature Act, 1925, s. 31 (d). When the King's Bench has final jurisdiction, if the issue comes in a civil cause before the Court of Appeal, then the latter will refrain from decision: *London County Council v. Lee* (1939), 55 T. L. R. 369.

(*m*) *Ib.*

(*n*) *Ib.* s. 63. If they disagree, the decision below stands: *Metropolitan Water Board v. Johnson*, [1913] 3 K. B. 900.

(*o*) *Ib.*

(*p*) *Ib.*, 1873, s. 46 (not repealed).

(*q*) Judicature Act, 1873, s. 47. It was decided in the seventeenth century that a prisoner acquitted after standing in danger of imprisonment cannot be tried again: cf. *R. v. Duncan* (1881), 7 Q. B. D. 198; *R. v. Bowden* (1661), 1 Keb. 124.

(*r*) *Ib.* 1881, s. 15.

of Criminal Appeal by the Criminal Appeal Act, 1907 (*s*), by which the latter Court was established. Prior to the passing of the last-mentioned Act, the stating of a case on a point of law under the Crown Cases Act, 1848, was entirely at the discretion of the judge, commissioner, or justices, who tried the case. Now, under the Act of 1907, where a person appeals against a conviction on a point of law alone, the Court of Criminal Appeal may require a case to be stated as under the Crown Cases Act, 1848 (*s*).

**The Court of Criminal Appeal.**—*Composition.*—This Court was established by the Criminal Appeal Act, 1907 (*t*), and, except as provided by this Act or by the Judicature (Consolidation) Act, 1925, no appeal lies from any judgment of the High Court in any criminal cause or matter (*u*). The Court is composed of the lord chief justice and all the judges of the King's Bench Division of the High Court of Justice, any three, or an uneven number, of whom form a quorum (*x*). The sittings of the Court are as provided by rules of Court under the Act, and the determination of the appeal is according to the majority of the judges sitting, and, except on questions of law where the Court directs to the contrary, judgment is delivered by the president (*viz.*, the lord chief justice, or senior judge), and no separate judgments are delivered. The judgment of the Court is final, except where the director of public prosecutions, or the prosecutor, or defendant, obtains within seven days the certificate of the Attorney-General that the decision involves a point of law of exceptional public importance, when appeal may be brought to the House of Lords (*y*).

*Jurisdiction.*—The provisions of the Criminal Appeal Act, 1907, apply to convictions on indictments, criminal informations, coroners' inquisitions, cases dealt with by quarter sessions under the Vagrancy Act, 1824, and also to detention in a Borstal institution (*z*), the operation of the Act being similar in all cases as provided by the Act on indictments. But the Act does not apply to convictions on indictment or inquisition charging a peer or peeress, or person claiming the privilege of peerage, with any offence not lawfully triable by a Court

(*s*) 7 Edw. VII. c. 23, s. 20 (4).

(*t*) 7 Edw. VII. c. 23.

(*u*) 15 & 16 Geo. V. c. 49, s. 31.

(*x*) Act of 1907, s. 1, as amended by the Criminal Appeal (Amendment) Act, 1908 (8 Edw. VII. c. 46), s. 1.

(*y*) Act of 1907, s. 1; Criminal Justice Act, 1925, s. 16. Such a certificate is very reluctantly given: see *Woolmington v. Director of Public Prosecutions*, [1935] A. C. 462; *Director of Public Prosecutions v. Beard*, [1920] A. C. 479; *Andrews v. Director of Public Prosecutions*, [1937] A. C. 576. Pending appeal, bail may be given. The Court is not bound to follow the rulings of the Privy Council: cf. *Ras Behari Lal v. King Emperor* (1933), L. R. 60 Ind. App. 354, against *R. v. Thomas*, [1933] 2 K. B. 489, on ignorance of English by jurors. Nor is it desirable for the Privy Council to deviate from the views of the Court on the nature of mental defect in murder trials: *Sodeman v. R.*, [1936] W. N. 190; Keith, *The Dominions as Sovereign States*, p. 407. But a diverse view of the Court of Appeal, which in *Hardie and Lane v. Chilton* (No. 2), [1928] 2 K. B. 306, ruled that it was legal to exact money by threatening to blacklist a member of an association for violation of a price agreement, while in *R. v. Denyer*, [1926] 2 K. B. 258, this was ruled criminal, is approved by *Thorne v. Motor Trade Assn.*, [1937] A. C. 797.

(*z*) 4 & 5 Geo. V. c. 58, s. 10 (5). Appeal lies also from the finding of the trial jury that a woman is not pregnant under the Sentence of Death (Expectant Mothers) Act, 1931 (21 & 22 Geo. V. c. 24), s. 2 (4).

of Assize; nor to convictions on indictment at common law in relation to the non-repair or obstruction of any highway, public bridge, or navigable river (*a*).

A person convicted may appeal against conviction without leave on any ground of appeal involving a question of law alone, but, if the ground is unsubstantial the Court may dismiss the appeal summarily (*b*). He may appeal also on law and fact or fact with the leave of the Court or the certificate of the trial judge (*c*), and against sentence with the leave of the Court where the sentence is not fixed by law (*d*).

*Procedure.*—Notice of appeal (in cases where leave is not required) or notice of application for leave to appeal must be given within ten days of the date of the conviction in the manner provided by the rules of Court made under the Act; and, except in cases involving sentence of death, the time may be extended at any time by the Court or a judge thereof (*e*).

The appellant may, if he so desires, present his case and argument in writing instead of by oral argument (*f*). No costs are allowed on either side on appeals under the Act (*g*).

*Powers of the Court.*—The Court must allow the appeal in the following cases: (*a*) if it thinks the verdict of the jury was unreasonable, or cannot be supported by the evidence; (*b*) or that the judgment should be set aside on the ground of wrongful decision of any point of law; (*c*) or that on any ground there was a miscarriage of justice. But though the Court thinks the case might be settled in favour of the appellant, it may dismiss the appeal if it considers that no miscarriage of justice actually occurred. If the Court does not allow the appeal, it must dismiss it (*h*).

On an appeal against sentence, the Court may quash the sentence and pass such other sentence in substitution as may be warranted in law by the verdict, whether more or less severe (*i*). But on a plea of guilty it has no power, it seems, to substitute another sentence. (*R. v. Ettridge* (*k*).) It may alter a sentence where it holds that a conviction has been improperly recorded on some part of the indictment, but properly on another part (*l*).

It may alter a verdict where it is satisfied that in convicting for an offence the jury must have been satisfied of facts constituting

(*a*) Act of 1907, s. 20 (2), (3). In the latter class of cases appeal lies to the Court of Appeal (15 & 16 Geo. V. c. 49), s. 29. (*b*) *Ib.* ss. 3, 15 (2).

(*c*) *Ib.* s. 3 (2). But a certificate ought not to be granted merely because counsel for the defence presses for it: *R. v. Boseley* (1933), 26 Cr. App. R. 99.

(*d*) *Ib.* s. 3 (3). Sentence includes an order to pay compensation under the Forfeiture Act, 1870, s. 4: *R. v. Jones*, [1929] 1 K. B. 211.

(*e*) *Ib.* s. 7 (1). On good cause bail may be allowed by the Court of Criminal Appeal: *R. v. Klein* (1932), 23 Cr. App. R. 173; *R. v. Harding* (1931), 23 Cr. App. R. 143.

(*f*) *Ib.*

(*g*) *Ib.* s. 13 (1).

(*h*) Act of 1907, s. 4 (1). The Court quashed a conviction based on suspicion: *R. v. Wallace* (1931), 23 Cr. App. R. 32. On no miscarriage of justice, see *R. v. Coulthred* (1933), 24 Cr. App. R. 44; *R. v. Wright* (1935), 25 Cr. App. R. 35. If it appears that there has been no regular trial, it can order a new trial: *Crane v. R.* [1921] 2 A. C. 299; *R. v. Gee*, [1936] 2 K. B. 442.

(*i*) *Ib.* s. 4 (2).

(*k*) [1909] 2 K. B. 24.

(*l*) Act of 1907, s. 5 (1).

a different offence (*m*), and where a special verdict has been wrongly applied may order the right conclusion to be recorded (*n*).

If it appears that the appellant, though guilty of some act or omission, was insane, the Court may quash the sentence and order the appellant to be kept in custody as a criminal lunatic under the Trial of Lunatics Act, 1883 (*o*), in the same manner as if a special verdict had been found by the jury under that Act (*p*).

The Act replaces the former practice by which in cases of misdemeanour as opposed to felony a new trial could be ordered, a practice in force from 1673 only.

On the consideration of a petition for pardon in reference to conviction on indictment, information, &c., or to the sentence (other than sentence of death) passed on a person convicted after April 18, 1908, the Home Secretary (or a Secretary of State) is empowered to refer the whole case to the Court of Criminal Appeal, which must hear and determine the case as on an appeal by a convicted person; or he may refer any point arising in the case to the Court for its opinion. This provision, however, does not affect in any way the prerogative of mercy (*q*).

The Business of Courts Committee in December, 1933, recommended the inclusion of the Court in the Court of Appeal, but this proposal has not been carried out.

**His Majesty's Court of Appeal.**—*Composition.*—Under the Judicature (Consolidation) Act, 1925, the Court is constituted of *ex-officio* judges and of five ordinary judges, increased to eight by the Supreme Court of Judicature (Amendment) Act, 1938 (s. 1). The *ex-officio* judges shall be the Lord Chancellor, any ex-Lord Chancellor, any lord of appeal in ordinary who at the date of his appointment would have been qualified to be a judge of the Court of Appeal or who at that date was a judge of that Court, the Lord Chief Justice, the Master of the Rolls, and the president of the Probate Division. The ordinary judges of the Court of Appeal are styled "Lords Justices of Appeal." The Lord Chancellor is president of the Court (*r*). The Court of Appeal, therefore, is now composed of the following *ex-officio* judges, viz. the Lord Chancellor, the Lord Chief Justice of England, the president of the Probate, Divorce, and Admiralty Division, and the lords of appeal in ordinary, together with nine permanent judges, viz., the Master of the Rolls and eight lords justices of appeal. The qualification for membership is standing for fifteen years as a barrister or a judgeship of the High Court, and the Prime Minister selects (*s*).

In addition to these, the Lord Chancellor is empowered to request the attendance at any time of any judge or ex-judge of the High

(*m*) Act of 1907, s. 5 (2). Cf. Criminal Appeal (Scotland) Act, 1926, s. 3 (2); *Paton v. Lord Advocate* [1936] Sc. L. T. 298.

(*n*) *Ib.* s. 5 (3).

(*o*) 46 & 47 Vict. c. 38.

(*p*) Act of 1907, s. 5 (4).

(*q*) *Ib.* ss. 19, 23.

(*r*) 15 & 16 Geo. V. c. 49, s. 6.

(*s*) But the Lord Chancellor successfully blocked the promotion of the Attorney-General in 1907; Fitzroy, *Memoirs*, i, 315. Sir Henry Slessor, however, was appointed by the Labour Government in 1929, despite youth and inexperience.

Court to sit as an additional judge of the Court of Appeal, and the power is not rarely used. Ex-Lord Chancellors and lords of appeal in ordinary are not required to sit and act except with their consent, upon the request of the Lord Chancellor (*t*). It is now easy to have three divisions of the Court sitting at one time.

*Jurisdiction.*—There is vested in the Court of Appeal all jurisdiction formerly vested in the Lord Chancellor and the Court of Appeal when exercising appellate jurisdiction; all jurisdiction of the Court of Exchequer Chamber; so much of the jurisdiction of the Privy Council as related to Admiralty matters, and the jurisdiction of the Lord Chancellor or other person in lunacy matters; and all jurisdiction conferred on the Court of Appeal since the Judicature Act, 1873, and not repealed by this Act (*u*). Appeal also lies from any judgment or order of the High Court, except when acting as a Prize Court. Appeal also lies in causes and matters matrimonial where there has been a jury (*x*), and from the Palatinate Courts (*y*). As noted above since 1934, appeal lies from the County Courts.

The following restrictions on appeals should, however, be noticed:—

- (a) No appeal lies from an order of a judge giving unconditional leave to defend an action (*z*).
- (b) No appeal lies from an order allowing extension of time for appealing from a judgment or order (*a*).
- (c) The judgment of a divisional Court on an appeal from an inferior Court is final, unless leave to appeal be given by the divisional Court or by the Court of Appeal (*b*).
- (d) The judgment of the Court of Criminal Appeal is final, except in the cases previously mentioned, when appeal lies to the House of Lords (*c*).
- (e) No appeal lies, except by leave, from an order made by consent, or as to costs only, which by law are left to the discretion of the judge (*d*).
- (f) Except in matters of practice and procedure, when appeal from a judge always is to the Court of Appeal, an appeal does not lie *direct* to the Court of Appeal from an order made in chambers (*e*), unless by special leave of the judge by whom the order was made or of the Court of Appeal.

(*t*) 15 & 16 Geo. V. c. 49, s. 6.

(*u*) Judicature Act, 1925, s. 26. This includes appeals in Workmen's Compensation Cases; under Agricultural Holdings Act, 1923; registration appeals; divorce appeals (44 & 45 Viet. c. 68, s. 9); appeals in railway and canal traffic cases. On the general character of appellate jurisdiction, see *Evans v. Bartlam*, [1937] A. C. 473.

(*x*) *Ib.* s. 27. On appeal on setting aside a jury's verdict, the Court may make a decree *nisi*, and not merely order a new trial: *Croker v. Croker and South*, [1932] P. 173.

(*y*) *Ib.* s. 28.

(*z*) *Ib.* s. 31 (1) (*c*).

(*a*) *Ib.* s. 31 (1) (*b*).

(*b*) *Ib.* s. 31 (1) (*f*).

(*c*) *Ib.* s. 31 (1) (*a*).

(*d*) *Ib.* s. 31 (1) (*h*); *D. Campbell & Co. v. Pollak* (No. 2), [1927] A. C. 732.

(*e*) *Ib.* s. 31 (1) (*g*) and (3). As to procedure, see *Dawson v. Hill* (No. 2) (1935), 152 L. T. 279.

- (g) No appeal lies where by statute the decision of a Court or judge is to be final (f).
- (h) Without its special leave the decision of the High Court on questions of law in Parliamentary and municipal election cases is final (g); if appeal is allowed, the decision of the Court of Appeal is final.
- (i) No appeal lies from any interlocutory order or judgment without the leave of the judge or of the Court of Appeal (h).
- (j) A decree *nisi* is appealable without leave. But no appeal lies from an order absolute for dissolution or nullity of marriage in favour of any party who, having had time and opportunity, has failed to appeal from the decree *nisi* (i).

An appeal to the Court of Appeal from any decree, final order, or judgment, or to set aside a verdict, finding, or judgment in any trial with a jury in the High Court, is to be heard by three judges of appeal (k). But appeals from an interlocutory order, decree, or judgment are heard by two judges (l). And where all the parties to an appeal or motion before the hearing file a consent, the appeal or motion may in general be heard and determined by two judges (m).

The duties of the Court of Appeal on questions of fact found in the Court below are by the House of Lords restricted to considering whether the judge or jury has performed his or their function judicially, not whether the conclusion seems to the Court sound (n).

The Judicature Act, 1875, empowered the Court of Appeal to sit in two divisions at the same time; by the Judicature Act, 1925 (o), it may now sit in three divisions at the same time, additional judges, if necessary, being drawn from the High Court, but the addition of three justices renders this help less essential. Power was given by the Supreme Court of Judicature (Amendment) Act, 1935, to the Lord Chancellor to appoint a Vice-President to preside in one division; the Lord Chief Justice intervened to protest against the bill as aimed at a particular justice, and the Act saves existing seniority rights. The purpose is to have an expert in common law as Vice-President.

**The House of Lords.**—The appellate jurisdiction of this body was threatened by the Judicature Act, 1873, when it was proposed to make the Court of Appeal final. Unfortunately, on a change of government, the House of Lords repented of its consent; in 1875 operation of the

(f) Judicature Act, 1925, s. 31 (1) (d). See, e.g., 23 & 24 Geo. V. c. 51, ss. 184 (5), 187 (3), as to payments by county and borough councils on appeal to the High Court by persons aggrieved.

(h) *Ib.* s. 31 (1) (i); but this does not apply in case of liberty of the subject, custody of infants, decree *nisi* in matrimonial causes, and other matters.

(i) *Ib.* s. 31 (1) (e).

(l) *Ib.*

(m) *Ib.* s. 68 (5); but see the exception there mentioned with regard to infants and lunatics.

(n) *Powell v. Streatham Manor Nursing Home*, [1935] A. C. 243; *Mechanical and General Inventions Co. v. Austin Motor Co.*, [1935] A. C. 346. The Court of Appeal will not disturb an award of damages by a judge without a jury unless it appears that he acted on a wrong principle of law or took an erroneous view of the evidence as to the damage: *Owen v. Sykes*, [1936] 1 K. B. 192.

(o) Judicature Act, 1925, s. 68 (3).

(g) *Ib.* s. 31 (1) (j).

(k) *Ib.* s. 68 (1).

change was postponed, and in 1876 it insisted on the retention of the appeal, though at the same time the House was strengthened in personnel by the Judicature Act, 1876, and to it now lie appeals from the Court of Appeal in England, and from those Courts in Scotland from which error or appeal lay to the House of Lords, and also from the Court of Appeal in Northern Ireland (*p*). Appeals from the Irish Free State were to lie to the Privy Council, but by Constitution (Amendment No. 22) Act, 1933, such appeals were abolished.

*Composition.*—On the hearing of an appeal there is now a convention of binding character that no peer shall take part who has not held high judicial office; the rule has been operative since 1844. It is necessary that at any hearing there must be present at least three lords of appeal from amongst the following persons:—

- (1) The Lord Chancellor.
- (2) The lords of appeal in ordinary.
- (3) Such peers as hold or have held high judicial offices; by convention ex-Lord Chancellors sit if asked to do so by the Lord Chancellor.

There are now seven lords of appeal in ordinary appointed under the provisions of the Appellate Jurisdiction Acts, 1876, 1913, and 1929 (*q*).

A lord of appeal in ordinary ranks as a baron, and may sit and vote in the House of Lords during his life (*r*). He is also (if, as is always the case, a privy councillor) a member of the judicial committee of the Privy Council, and must sit as such, without prejudice to his duties in the House of Lords, the two Courts thus tending to agree in personnel to a considerable extent. A sitting of the House for judicial purposes is a sitting of the House, and the judgments are entered in its journals; each peer may give his own view; a bill may even be read for a first time at such a session, though this has been questioned, on March 1, 1921, as unconstitutional. Procedure is by petition, error on the record having been abolished. Prior to the creation of lords of appeal the judges were frequently invited to advise, but that is now obsolescent, though they were consulted in a civil case in 1897, and on Earl Russell's trial for bigamy in 1901. As a rule either three or five lords make up the Court. The House of Lords may sit as a Court of Appeal during prorogation if the House of Lords during the preceding session so appoints (*s*). It may also sit during dissolution if authorised by His Majesty under the sign manual (*t*).

The Business of Courts Committee (December, 1933) suggested that appeals from the Court of Appeal should never lie as of right, but only by leave of the Court or of the House of Lords, and effect

(*p*) Government of Ireland Act, 1920, s. 49. On the legislation of 1873—76, see May, Const. Hist., iii, 285—288. Appeals from Scotland were not provided for in the Act of Union in 1707, but were insisted on despite Scots protests.

(*q*) Two were appointed under s. 6 and two more under s. 14 of the Act of 1876 respectively. The Act of 1913 raised the number to six; that of 1929, s. 2, to seven. For the rule, see 39 & 40 Vict. c. 59, s. 5; 24 & 25 Geo. V. c. 40, s. 2.

(*r*) App. Jur. Act, 1876, s. 6; App. Jur. Act, 1887, s. 2. Until the passing of the latter Act the lords of appeal in ordinary could only sit and vote during tenure of office.

(*s*) App. Jur. Act, 1876, s. 8.

(*t*) *Ib.* s. 9.

was given to this by the Administration of Justice (Appeals) Act, 1934 (24 & 25 Geo. V. c. 40), s. 1, which authorises the House of Lords to constitute a committee to deal with petitions for leave to appeal, which is not readily granted. In either case, of course, the leave granted may be conditional, *e.g.*, on payment of costs by appellant, and, no doubt, an appellant could apply to the lords for unconditional leave, if refused by the Court of Appeal.

**The Judicial Committee of the Privy Council.**—Appeals to this Court from the ecclesiastical Courts, Courts in prize, the Channel Islands, the Isle of Man, and from British Courts abroad were left untouched by the Judicature Acts.

*Composition.*—As originally constituted in 1833 (3 & 4 Will. IV. c. 41), the members of the judicial committee comprised the Lord President, ex-Lord Presidents, the Lord Chancellor, such of the members of the Privy Council as hold or have held certain offices, including, in ecclesiastical cases, every archbishop or bishop being a privy councillor (*u*). By the Judicial Committee Act, 1871 (*x*), four paid members were added.

The seven lords of appeal in ordinary have now taken the place of the four paid members of the judicial committee (*y*), while the posts which constitute “high judicial office” are defined by the Appellate Jurisdiction Act, 1887 (*z*). Chief justices or judges of the superior Courts in various Dominions, being members of the Privy Council, are also to be members of the judicial committee, without limit of number, under the Judicial Committee Amendment Act, 1895, the Appellate Jurisdiction Act, 1913, and the Administration of Justice Act, 1928. By the Appellate Jurisdiction Act, 1908, former chief justices or judges of any High Court in British India, being members of the Privy Council, might be members of the judicial committee (but not exceeding two in number) if His Majesty so directs (*a*). Provision is made for two paid members, being judges or ex-judges of Indian High Courts, or barristers, advocates or vakils of fourteen years’ standing, who hold office during good behaviour, retiring at age seventy-two, by the Appellate Jurisdiction Act, 1929. It is also possible for the Crown to appoint two persons not qualified by judicial office; Lord Oxford and Asquith sat under this clause. Such archbishops and bishops as are privy councillors no longer sit as members of the committee, but may be called in as assessors (*b*).

Under the original Act four members formed a quorum (*c*), but this number was reduced to three by 6 & 7 Vict. c. 38. The Council’s advice must be unanimous in form and has no effect until approved by His Majesty in Council, but such action is formal.

(*u*) 3 & 4 Will. IV. c. 41, ss. 1, 6, 16, 30.

(*x*) 34 & 35 Vict. c. 91.

(*y*) App. Jur. Act, 1876, ss. 6, 14, 24; App. Jur. Act, 1913, s. 1; App. Jur. Act, 1929, s. 2.

(*z*) S. 5; and see App. Jur. Act, 1876, s. 25, and the Judicial Committee Act, 1881, s. 1.

(*a*) 58 & 59 Vict. c. 44; 3 & 4 Geo. V. c. 21; 18 & 19 Geo. V. c. 26; 8 Edw. VII. c. 51, ss. 2 (1), (2), 3.

(*b*) App. Jur. Act, 1876, ss. 12, 24.

(*c*) 3 & 4 Will. IV. c. 41, s. 5.

**Special Reference.**—The Crown has the power to refer to the Judicial Committee any legal issue on which it desires advice; where the issue is not wholly judicial, the Lord President or Colonial Secretary or Home Secretary may sit on a committee *ad hoc*. It has done so especially as regards colonial issues, such as the claim of Newfoundland to Labrador (*d*), the power of the Governor of Northern Ireland to appoint a boundary commissioner under the Irish Treaty of 1921 (*e*), the question of the powers of the Legislative Council of Queensland in money bills (*f*), the precedence of judges (*g*), the vacating of a seat in the House of Commons because of a firm of which a member was a partner having a contract with the India Office (*h*), disputes between ecclesiastical persons (*i*), &c. Its advice is properly sought on the removal of colonial judges (*k*), and has been made the one legal mode of procedure by the Government of India Act, 1935 (*l*), and the Government of Burma Act, 1935 (*m*). A very valuable report on piracy *jure gentium* was rendered on such a reference to clear up a point wrongly decided in a colonial Court, whether—as it was ruled—it suffices to constitute piracy that an attempt to rob at sea has been made (*n*).

Other cases affect the issue of certain Orders in Council regarding judicial arrangements in Jersey (*o*), the obligation of the Royal Court of Jersey to give effect to writs of *habeas corpus* (*p*), the question of decisions by British agents of political issues in the Indian States (*q*) a claim for admission as an advocate to the Jersey bar (*r*).

Complaints from barristers are treated as appeals (*s*).

**Special Jurisdictions.**—There are provisions in various statutes for reference to the Privy Council, *e.g.*, under the Endowed Schools Act, 1869, a petition is allowed against schemes of the Board of Education (*t*). Under the Government of India Act, 1935, and the Government of Burma Act, 1935, questions of medical qualifications fall to be

(*d*) (1927), 43 T. L. R. 289. So in 1884 as regards the boundary between Ontario and Manitoba.

(*e*) Parl. Paper, Cmd. 2214. (*f*) *Queensland Money Bills Case*, April 3, 1886.

(*g*) *Bedard, In re* (1849), 7 Moo. P. C. 23, 29.

(*h*) *Sir Stuart Samuel, In re*, [1913] A. C. 514.

(*i*) *Bishop of Natal, In re* (1865), 3 Moo. P. C. (N.S.) 115; *Ward v. Bishop of Mauritius* (1906), 23 T. L. R. 52.

(*k*) See Report in 6 Moo. P. C. (N.S.) App. 9—21 (1870); *Cloete v. R.* (1854), 8 Moo. P. C. 484; *Willis v. Gipps* (1846), 5 Moo. P. C. 379.

(*l*) 26 Geo. V. & 1 Edw. VIII. c. 2, s. 200 (2).

(*m*) *Ib.* c. 3, s. 81 (2).

(*n*) [1934] A. C. 584. A like power to refer exists in Canada, but not in the Commonwealth of Australia: Keith, Constitutional Law of the British Dominions, p. 307.

(*o*) *The States of Jersey, In re* (1853), 9 Moo. P. C. 185. Cf. issue as to giving assent to legislation: *Jersey Jurats, In re* (1866), L. R. 1 P. C. 94.

(*p*) *Belson, In re* (1850), 7 Moo. P. C. 114.

(*q*) *Nawab of Surat, In re* (1854), 9 Moo. P. C. 88; *Madhava Singh v. Secretary of State for India* (1904), L. R. 31 Ind. App. 239.

(*r*) *D'Allain v. Le Breton* (1857), 11 Moo. P. C. 64.

(*s*) *Renner, In re*, [1897] A. C. 219; *Macaulay v. Supreme Court Judges, Sierra Leone*, [1928] A. C. 344; *McLeod v. St. Aubyn*, [1899] A. C. 549; *Prafulla Ranja Das v. Patna High Court Judges* (1931), 47 T. L. R. 98.

(*t*) 32 & 33 Vict. c. 56, s. 39; 2 Edw. VII. c. 42, s. 13; *Colchester School, In re*, [1898] A. C. 477.

determined by the Council (*u*). It decides also issues as to objections to cathedral schemes (*x*), and questions as to union of benefices (*y*). In certain cases licences to republish copyright works can be given by the Council (*z*). The University Committee considers judicially petitions from members of universities against legislation by the governing bodies (*a*), and issues as to grants of charters of any kind are treated judicially, as also claims to be placed on the authorised roll of the baronetage, which go before a special committee to hear evidence.

(*u*) 26 Geo. V. & 1 Edw. VIII. c. 2, s. 120; c. 3, s. 52.

(*x*) 21 & 22 Geo. V. No. 7, ss. 6, 11, 12, 14.

(*y*) Union of Benefices Measure, 1923; (Amendment) Measure, 1936 (26 Geo. V. & 1 Edw. VIII., No. 2); *Union of the Benefices of Westoe and South Shields, St. Hilda, Durham County* (1939), 55 T. L. R. 349.

(*z*) 1 & 2 Geo. V. c. 46, s. 4.

(*a*) *E.g.*, petitions from Cambridge colleges regarding statutes affecting scholarships; *The Times*, July 18, 1933.

## CHAPTER IV.

## JUDICIAL TENURE AND FUNCTIONS.

*Judicial Tenure.*

AN essential feature of the law of the Constitution is the security of judicial tenure. Prior to that being granted under the Act of Settlement, 1701, the judiciary was always susceptible of control by the Crown. This was brought out specifically in the case of *Commendams* in 1616 when Coke was dismissed from the office of Chief Justice of King's Bench because of his refusal to undertake that he would postpone action in any case in which the King intimated the desire that it should not be proceeded with without his consideration (*a*). The gain to the Crown by this exercise of power was, however, paid for by the loss of weight in the judgments of the Courts, and for their share in the judgment in the case of *Ship Money* (*b*) the Long Parliament impeached five judges and obtained from the King a promise to appoint judges for the future during good behaviour (*c*). James II. dismissed four judges to make him secure of a decision favourable to the dispensing power which he claimed (*d*). The solution of the Act of Settlement had the merit of giving tenure during good behaviour but permitting removal by the Crown on address from both Houses of Parliament, as now provided (*e*). This procedure has very seldom been invoked; it is clear that in practice the judge would be given an opportunity of defence. They are exempt from unfavourable criticism in Parliament except on a formal motion, and possess a very wide immunity from liability in respect of their judicial actions (*f*). Criticism has normally turned on alleged bias in election petition decisions. But they are not above the power of Parliament, and the rule of publicity of proceedings is a safeguard to the public of great value (*g*), as is the principle that a mere possibility of bias is fatal to a judgment (*h*).

(*a*) *Commendams, Case of* (1616), Hob. 140; Maitland, *Const. Hist.*, pp. 268—271.

(*b*) (1637), 3 St. Tr. 825.

(*c*) Rushworth, ii, 1366.

(*d*) Macaulay, *Hist.*, ii, 735.

(*e*) 15 & 16 Geo. V. c. 49, s. 12. George III. laid it down that the demise of the Crown should not affect tenure: 1 Geo. III. c. 23. For procedure, cf. Mr. Speaker, 14 Hansard, 2 s., 500, 502, and Irish case of Sir Jonah Barrington, Todd, *Parl. Govt.* (2nd ed.), ii, 867. For colonial judges, cf. p. 277, *ante*.

(*f*) See p. 36, *ante*. As to the perhaps undue restriction of Press comment on judges, see p. 450, *post*.

(*g*) *Scott v. Scott*, [1913] A. C. 417. Only in quasi-executive matters are proceedings *in camera* allowable, e.g., *re insane persons*. Limitation of publication of details in

(*h*) *Dimes v. Grand Junction Canal* (1852), 3 H. L. C. 759. There is a curious exception in the case of the Privy Council and House of Lords as regards political issues in which the Government may easily be interested, and yet the Lord Chancellor may sit and deliver the judgment: e.g., *Marais (D. F.)*, *Ex parte*, [1902] A. C. 109. For the issue of bias in election petitions, cf. A. L. Lowell, *Govt. of England*, i, 255 ff.

The appointment of judges rests with the Crown, which as regards High Court judges acts on the advice of the Lord Chancellor; the Lords Justices of Appeal and the Lords of Appeal in Ordinary are appointed on the advice of the Prime Minister.

The judges are forbidden by law to sit in the House of Commons (i), and it is contrary to judicial etiquette for a judge to take any active part in politics while in office. This rule, of course, does not apply to the Lord Chancellor, whose post is essentially political, and its application to the Lords of Appeal in Ordinary has been disputed by Lord Sumner, but is normally observed in practice.

Judges are officers in His Majesty's service, and accordingly their salaries were legally reduced to £4,000 a year under the National Economy Act, 1931 (k), despite strong protests on constitutional grounds. They have since been restored by Order in Council of 1935 under 24 & 25 Geo. V. c. 24.

There is one serious criticism only of the present rules as to judges: the absence of a retiring age. The fact that there are judges whose capacity is not gravely affected by old age does not justify the remaining on the bench of judges who obviously cannot follow the proceedings owing to deafness; in the Dominions retiring ages have been found essential. There is nothing derogatory in recognition that old age should bring about retirement.

### *Judicial Functions.*

**Interpretation of the Common Law.**—The essential function of the judges is to apply the principles of law, unwritten or enacted, to cases brought before them, with a view to the maintenance of right and suppression of wrongs. They lack initiative, for questions must be adduced to them either by private persons or by representatives of the State, and they have no part in executing their judgments, which depend on executive action. The work of interpretation, however, is of the highest importance, for under cover of its exercise the judges virtually created and still in some measure create the common law, and the effect of statutes depends greatly on the spirit in which they are interpreted. In the early fourteenth century that the judges were making law was frankly admitted by Bereford, C.J., and Hengham, J., and Coke claimed that the decision in the so-called

divorce and other cases is based on public morality. But the Judicial Proceedings (Regulation of Reports) Act, 1926 (16 & 17 Geo. V. c. 61), has done much to facilitate collusive divorces which are accepted as normal by both Bench and Bar. In divorce cases, if undefended, right of public access is especially desirable, but it is not a ground of nullity of a decree rendered and not impugned before being made absolute: *McPherson v. McPherson*, [1936] A. C. 177 (appeal from Alberta). In the case of children and of domestic relations, the prohibitions are on moral grounds: Children and Young Persons Act, 1933 (23 Geo. V. c. 12), ss. 39, 49; Summary Procedure (Domestic Proceedings) Act, 1937 (1 Edw. VIII. & 1 Geo. VI. c. 58), s. 3. Suppression of names of defendants or prosecutors is normally a grave menace, if not to the purity of justice, at least to public confidence therein.

(i) 38 & 39 Vict. c. 77, s. 5; 15 & 16 Geo. V. c. 49, s. 12.

(k) 21 & 22 Geo. V. c. 43; Order in Council, 1931 (S. R. & O., 1931, No. 810, p. 847). Dominion practice varied, but it was absurd to suggest that judges could be affected injuriously by sharing a common sacrifice. Income tax can properly be levied on their salaries: *The Judges v. Atty.-Gen. for Saskatchewan* (1937), 53 T. L. R. 464.

*Taltarum's Case* effected a reform which Parliament had negated (*l*). Lord Mansfield's contributions to mercantile law are famous, and it is only since Bentham's insistence on the value of legislation that judge-made law has declined in importance (*m*), partly because it has been embodied, without even useful corrections, in the Sale of Goods Act, 1893, and the Bills of Exchange Act, 1882. The creative period of the common law is not yet over; it has, in recent times, invented both satisfactory and inconvenient doctrines. It has control of the doctrine of public policy, which it has expanded in various ways so as to invalidate agreements injurious to the State or its servants, or perverting the course of justice, or abusing legal process, or injurious to morals, or restraining trade in unreasonable ways, and in 1938 it was laid down by the House of Lords that in case of *felo de se* no payment could be claimed by the representatives of the deceased under an assurance policy, whatever its terms, though such payments had often been made (*n*). Public policy avoids contracts favouring trade with the enemy (*o*) or undue instigation to purchase honours (*p*) or violating the prohibition law while in force in the United States (*q*).

**Interpretation of Statutes.**—A much more limited power is exercised as regards statutory interpretation. The judges, when still part of the legislature or accustomed to be consulted by it, used to assume the function of applying a remedial statute to a case not properly covered by it, or of excepting cases from the operation of badly-worded statutes (*r*). But this is obsolete, and judges will not depart from the words of a clear statute because of its apparent contradiction with public policy (*s*), or even practicability (*t*), or the intention of legislature (*u*). If statutes are ambiguous, of course, they will be interpreted with reference to all relevant issues, the purpose of the Act, its several provisions, and even extraneous circumstances, if relevant (*x*). In cases of statutes it is deemed undesirable by the

(*l*) Cf. Plucknett, *Interp. of Stat.*, p. 22; Pollard, *Evolution of Parliament*, p. 252. On *Taltarum's Case* (1472), cf. Holdsworth, iii, 119, 137 (common recoveries). The doctrine of common employment dates from *Priestley v. Fowler* (1837), 3 M. & W. 1; that of liability for care of aged and incapable persons from 1893: *R. v. Instan*, [1893] 1 Q. B. 451; in *R. v. Manley*, [1933] 1 K. B. 529, it was found that common law recognised a misdemeanour at common law of giving false information to the police as to an alleged assault.

(*m*) Dicey, *Law and Opinion in England*, p. 165.

(*n*) *Beresford v. Royal Insurance Co.*, [1938] A. C. 586. So in Scotland a direction to exhume and re-inter invalidates a will if unreasonable: *MacKintosh's Judicial Factor v. Lord Advocate*, [1935] S. C. 406.

(*o*) *Janson v. Driefontein Consolidated Mines*, [1902] A. C. 484; *Ertel Bieber & Co. v. Rio Tinto*, [1918] A. C. 260.

(*p*) *Egerton v. Earl Brownlow* (1853), 4 H. L. C. 1; *Parkinson v. College of Ambulance*, [1925] 2 K. B. 1. (*q*) *Foster v. Driscoll*, [1929] 1 K. B. 470.

(*r*) Plucknett, *Interpretation of Statutes in Fourteenth Cent.*, pp. 57 ff.

(*s*) *Hardy v. Fothergill* (1888), 13 App. Cas. 351, 358; *Hollinshead v. Hazleton*, [1916] 1 A. C. 428.

(*t*) *Canadian Performing Right Soc. v. Famous Players Can. Corp.*, [1929] A. C. 456.

(*u*) *R. v. Barham* (1828), 8 B. & C. 99; *Abel v. Lee* (1871), L. R. 6 C. P. 365.

(*x*) *Hawkins v. Gathercole* (1855), 6 De G. M. & G. 1, 22. *The Croyth Hall*, [1931] A. C. 127; *Greiv v. Imperial Airways, Ltd.*, [1937] 1 K. B. 50. For the obscurity of the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1, as to damages due to persons deceased as a result of accident, see *Flint v. Lovell*, [1935] 1 K. B. 354; *Rose v. Ford*, [1936] 1 K. B. 90; reversed, [1937] A. C. 826; *Shepherd v. Hunter* (1938), 2 All E. R. 587; *Ellis v. Raine* (1938), 55 T. L. R. 344.

judges that they should be consulted as to interpretation in an advisory capacity and a proposal in 1928 to authorise the ministry to put such questions on rating issues was withdrawn on their objections.

**Binding Force of Precedent.**—It is now fixed law that the House of Lords is bound by its own decisions (as opposed to mere *dicta*, though the distinction is hard to draw) (*y*). All inferior Courts are bound by the decisions of any superior Court or a Court of equal status, though a judge sitting alone need not follow the view of another judge, and if they wish to depart from any such decision, must endeavour to distinguish it. The efforts to do this are often productive of curious results (*z*). The Privy Council is not bound by its previous decisions, nor by those of the House of Lords, but the two Courts seldom now disagree (*a*).

**Control of the Executive.**—It is the duty of the executive to obey the law of the land (*b*), and an essential part of judicial functions is to interpret the extent of the rights of the executive whether under prerogative or statute law, as has been illustrated above (*c*) and will be further set out in describing the rights of the subject, which are in very large measure dependent on judicial decisions (*d*). Thus it has been held that the Crown's priority in matters of debt has been, perhaps inadvertently, taken away by statute (*e*), that the prerogative in war is limited by certain international law rules (*f*), that the Crown cannot raise revenue, without authority from Parliament, by using its power to licence transactions regulated in war time (*g*), and so on. It lies with the Courts both to determine the validity of executive legislation (*h*) and to decide whether particular actions fall under such legislation (*i*).

(*y*) *London Street Tramways Co. v. London County Council*, [1898] A. C. 375.

(*z*) Cf. especially workmen's compensation cases: *Brooker v. Thos. Borthwick & Sons*, [1933] A. C. 669.

(*a*) But contrast *Victoria Ins. Co. v. Junction, &c. Mine*, [1925] A. C. 354, with *Blatchford v. Staaddon*, [1927] A. C. 461 (H. L.), on point of date of accident by disease; in *London Joint Stock Bank v. Macmillan*, [1918] A. C. 777 (H. L.), *Colonial Bank of Australasia v. Marshall*, [1906] A. C. 559, as to negligence as regards negotiable instruments is disapproved. For the Privy Council's freedom, see *Transferred Civil Servants (Ireland) Compensation, In re*, [1929] A. C. 242; *Read v. Bishop of Lincoln*, [1892] A. C. at p. 654. For the affirmation by the House of Lords of a Privy Council doctrine, *Toronto Power Co. v. Paskwan*, [1915] A. C. 743, of liability of coal owners and others to secure safety of employees against the Court of Appeal in *Fanton v. Denville*, [1932] 2 K. B. 309, see *Wilsons and Clyde Coal Co. v. English*, [1938] A. C. 57.

(*b*) *Eastern Trust Co. v. McKenzie, Mann & Co.*, [1915] A. C. 750.

(*c*) See Part III., Chap. IV.

(*d*) See Part VIII., Chap. II.

(*e*) *Food Controller v. Cork*, [1923] A. C. 647.

(*f*) *The Zamora*, [1916] 2 A. C. 77.

(*g*) *Att.-Gen. v. Wilts United Dairies* (1921), 37 T. L. R. 884; 91 L. J. K. B. 897 (licence for milk dealing). See the War Charges (Validity) Act, 1925, which validated *ex post facto* such charges; *Brocklebank v. R.*, [1925] 1 K. B. 52; *Marshal Shipping Co. v. R.* (1925), 41 T. L. R. 285. Cf. *Ferrier v. Scottish Milk Marketing Board*, [1937] A. C. 126 (illegal levy on certain classes of producers of milk).

(*h*) Invalidity of prohibition of recovering possession of houses occupied by munition workers, *Chester v. Bateson*, [1920] 1 K. B. 829; of assigning to a Royal Commission the question of compensation for requisitioned rum, *Newcastle Breweries, Ltd. v. R.*, [1920] 1 K. B. 854. Cf. *Central Control Board v. Cannon Brewery, Ltd.*, [1919] A. C. 744; *R. v. Secretary of State; O'Brien, Ex parte*, [1923] 2 K. B. 361.

(*i*) *China Mutual Steam Navigation Co. v. Maclay*, [1918] 1 K. B. 33; *Hudson's Bay Co. v. Maclay* (1920), 36 T. L. R. 469; *Sheffield Conservative Club v. Brighton* (1916), 85 L. J. K. B. 1669.

**The Prerogative Writs now Orders.**—The function of executive control is more directly exercised by certain writs, already mentioned (*k*), now converted into Orders, from January 1, 1939, especially in the case of executive exercise of legislative or judicial powers (*l*). Over the legislature the Courts have no power; if a private bill has been introduced into the Commons, it is impossible for the Courts to restrain a party from proceeding, even if the party has broken an undertaking given in Court proceedings (*m*). Nor will any effort be made to control by prohibition or *certiorari* a government department's intention of issuing a provisional order which is to be confirmed by Parliament (*n*). Likewise, neither *certiorari* or prohibition lies to the Church Assembly or the Legislative Committee (*o*). The Courts have, however, a certain power as regards the privileges of Parliament, but only indirectly (*p*).

**Prohibition.**—The order of prohibition forbids a body acting judicially to act in excess of its jurisdiction or in contravention of law. It is of course normally used to control lower Courts or ecclesiastical Courts (*q*), but it has been employed against the Comptroller-General of Patents, the Light Railway Commissioners, and in a famous case against the Electricity Commissioners in respect of a scheme formulated for incorporation of joint electricity authorities, though it was argued that, as the order required confirmation by the Minister of Transport, prohibition was premature (*r*). But it is not certain that this procedure is always in place; under the Housing Act, 1925, Part II., prohibition was issued to prevent the Minister of Health considering an irregular improvement scheme (*s*), but in a subsequent case some doubt was expressed, preference being exhibited for *certiorari* after the Minister's consideration of the scheme (*t*). The procedure in such cases has been simplified under the Housing Act, 1930, s. 11, so that neither prohibition nor *certiorari* now is

(*k*) See p. 255, *ante*. Their form might be simplified by 23 & 24 Geo. V. c. 36, s. 5, but this was not done, and in 1938 this section was revoked and instead Orders were substituted for the writs by the Administration of Justice (Miscellaneous Provisions Act, 1938 (1 & 2 Geo. VI. c. 63), ss. 7, 10. Leave is normally requisite to apply for an Order, and normally no relief can be granted or grounds relied on save those specified in the application for leave.

(*l*) See pp. 219, 223, *ante*.

(*m*) *Att.-Gen. v. Manchester, &c. Ry. Co.* (1838), 1 R. & C. C. 436. Petitioners to bring in a private bill may be restrained: *Stockton, &c. Ry. Co. v. Leeds, &c. Cos.* (1848), 5 R. & C. C. 691; *Heathcote v. North Staffordshire Ry.* (1850), 6 R. & C. C. 358.

(*n*) *R. v. Hastings Local Board* (1865), 6 B. & S. 401.

(*o*) *R. v. Legislative Committee of Church Assembly and Church Assembly*, [1928] 1 K. B. 411.

(*p*) See p. 75, *ante*.

(*q*) *R. v. North; Oakley, Ex parte*, [1927] 1 K. B. 491. For a more general use, see *R. v. Local Government Board* (1882), 10 Q. B. D. 309, at p. 321, *per* Brett, L.J. Prohibition lies to Income Tax Commissioners: *Kensington I. T. Commrs. v. Aramayo*, [1916] 1 A. C. 215; to assessment committees: *R. v. North Worcestershire Assessment Comm.*; *Hadley, Ex parte*, [1929] 2 K. B. 397. It does not lie to a military Court under martial law, as that is not a judicial proceeding: *R. v. Maguire*, [1923] 2 Ir. R. 58; *Clifford and O'Sullivan, In re*, [1921] 2 A. C. 570.

(*r*) *R. v. Electricity Commrs.*, [1924] 1 K. B. 171.

(*s*) *R. v. Minister of Health; Davis, Ex parte*, [1929] 1 K. B. 619.

(*t*) *Minister of Health v. R.; Yaffé, Ex parte*, [1931] A. C. 494.

used (*u*). Prohibition did not lie to the Attorney-General in his former patent jurisdiction (*x*), nor to an inspector of the Board of Trade to investigate the affairs of a company (*y*).

**Certiorari.**—The order of *certiorari* can be used in cases where action is taken by a body not normally regarded as a Court, as formerly in the case of the Minister of Health's action in altering and confirming a housing scheme (*z*). It has been used to quash a decision of the Board of Education regarding the obligations of a local authority in respect of a non-provided school (*a*). Apparently it extends to the acts or orders of a competent authority which has power to impose a liability or to give a decision determining the rights or property of the parties affected (*b*).

**Mandamus.**—The order of *mandamus* lies to inferior executive authorities to require them to perform duties legally owed to a subject as distinct from the Crown (*c*), but not where discretion is vested in the officer. It does not lie to the Crown or a Minister of the Crown representing it (*d*), though it has been issued to the Board of Education (*e*). The order does not issue if an action would lie for tort against an executive authority, or if there is a more convenient procedure available (*f*).

A *mandamus* is made by the Administration of Justice (Miscellaneous Provisions) Act, 1938 (s. 8), the proper mode of procedure to require justices of the peace or officers of County Courts to perform any duty, or to secure the statement of a case by courts of summary jurisdiction or quarter sessions.

The Court has the power to use these orders to prevent military Courts under the Army Act exceeding their jurisdiction, but they do not interfere in issues of military discipline (*g*), nor, as will be seen later,

(*u*) *Errington v. Minister of Health*, [1935] 1 K. B. 249; *Offer v. Minister of Health*, [1936] 1 K. B. 40. But it, with *certiorari* and *mandamus*, lie, e.g., as to change of boundaries: *Purfleet Urban Council v. Minister of Health* (1936), 105 L. J. K. B. 44.

(*x*) *Van Gelder's Patent, In re* (1888), 6 R. P. C. 22.

(*y*) *Grosvenor, &c. Hotel Co., In re* (1897), 13 T. L. R. 309.

(*z*) See note (*t*); *R. v. Woodhouse*, [1906] 2 K. B. 501, 535; *R. v. Minister of Health; Dore, Ex parte*, [1927] 1 K. B. 765.

(*a*) *Board of Education v. Rice*, [1911] A. C. 179.

(*b*) *Local Government Board v. Arlidge*, [1915] A. C. 120, at p. 140, *per* Lord Parmoor. E.g., an auditor, *Roberts v. Cunningham* (1926), 42 T. L. R. 162; *cf. R. v. Minister of Transport; Upminster Services, Ex parte*, [1934] 1 K. B. 277; *R. (Bryson) v. Linsaskea Poor Law Guardians*, [1918] 2 I. R. 258.

(*c*) *cf. R. v. Secretary of State for War*, [1891] 2 Q. B. 326, and *R. v. Bank of England* (1780), 2 Dougl. 506.

(*d*) *R. v. Commrs. of Customs* (1836), 5 A. & E. 380; *R. v. Lords Commrs. of Treasury* (1872), L. R. 7 Q. B. 387.

(*e*) *Board of Education v. Rice*, [1911] A. C. 179. It can be brought by an urban council against the Minister of Health, e.g., *Purfleet Urban Council v. Minister of Health* (1935), 105 L. J. K. B. (H. L.) 44; *R. v. Minister of Health; Finsbury Borough Council, Ex parte* (1934), 32 L. G. R. 349.

(*f*) *R. v. Charity Commrs.*, [1897] 1 Q. B. 407; *R. v. City of London Assessment Comm.*, [1907] 1 K. B. 764; *R. v. Bristol Licensing Justices* (1893), 9 T. L. R. 273; *R. v. L. C. C.* (1911), 27 T. L. R. 422; *R. v. Bedwellty Urban Council*, [1934] 1 K. B. 333.

(*g*) *Sutton v. Johnstone* (1786), 1 T. R. 493; *Dawkins v. Lord Paulet* (1869), L. R. 5 Q. B. 94; *Dawkins v. Lord Rokeby* (1875), L. R. 7 H. L. 744; *Heddon v. Evans* (1919), 35 T. L. R. 642.

do they interfere with martial law tribunals, because they are not Courts of any kind (*h*).

The Courts accept from the executive declarations on foreign issues, such as existence of States, their status, and so on (*i*).

**Control of Local Authorities, &c.**—The prerogative writs are widely used to control governmental authorities; thus *certiorari* lies to the London County Council to negative its action in permitting illegally Sunday opening of cinemas (*k*), though the legislature later rendered legal on conditions such action by the Sunday Entertainments Act, 1932 (22 & 23 Geo. V. c. 51), and *mandamus* and prohibition are in regular use. The Attorney-General, with or without a relator, can bring actions to prevent public bodies acting in an illegal manner which tends to injure the public, even without proof of injury, even if *certiorari* is possible (*l*), and similarly he can claim an injunction against any person or corporate body to restrain breach of statute, even if a penalty is prescribed (*m*). Even without the Attorney-General a public wrong may be vindicated if the person bringing the action suffers special damage (*n*) or has a private right also affected (*o*).

Questions as to legality of appointments to office (*p*) or the validity of charters and rights (*q*) thereunder were open to decision on information in the nature of the old writ *quo warranto*, for which the Administration of Justice (Miscellaneous Provisions) Act, 1938 (s. 9) substitutes an application for an injunction. The procedure applies only to offices held on good behaviour or not on pleasure; for elective offices procedure by petition is now available (*r*).

**Subsidiary Functions.**—The Courts undertake certain functions of a quasi-executive character in respect of infants and lunatics, the administration of trusts, the realisation and distribution of insolvent estates, and the liquidation of companies. They issue titles of right, such as decrees of foreclosure against a mortgagor, of adjudication or discharge in bankruptcy, &c. They also issue declarations of right, *e.g.*, of legitimacy or legitimation by subsequent marriage under the Legitimacy Act, 1926 (16 & 17 Geo. V. c. 60), and of nullity of marriage, and they have power to declare legal rights, whether any consequential relief is sought or not (*s*). But the power to make

(*h*) *Clifford and O'Sullivan, In re*, [1921] 2 A. C. 570.

(*i*) *Engelke v. Musmann*, [1928] A. C. 433. See p. 348, *post*.

(*k*) *R. v. London County Council; Entertainments Protection Assocn., Ex parte*, [1931] 2 K. B. 215.

(*l*) *Att.-Gen. v. Tynemouth Corporation*, [1899] A. C. 293. Cf. *Att.-Gen. v. L. & N. W. Ry. Co.*, [1900] 1 Q. B. 78.

(*m*) *Att. Gen. v. Sharp*, [1931] 1 Ch. 121; *Att.-Gen. v. Cockermouth Local Board* (1874), L. R. 18 Eq. 172.

(*n*) *Benjamin v. Storr* (1874), L. R. 9 C. P. 400. Cf. *Boyce v. Paddington Borough Council*, [1903] 1 Ch. 109.

(*o*) *Lyon v. Fishmongers Co.* (1876), 1 App. Cas. 662; *Att.-Gen. v. Logan*, [1891] 2 Q. B. 100.

(*p*) *Darley v. The Queen* (1845), 12 Cl. & F. 520; *R. v. Speyer*, [1916] 2 K. B. 858; *R. v. Beer*, [1903] 2 K. B. 693.

(*q*) See pp. 10, note (*m*), and 236, *ante*.

(*r*) Local Government Act, 1933, s. 84 (1); *Bishop v. Deakin*, [1936] Ch. 409.

(*s*) R. S. C., Order XXV. r. 5; *Guaranty Trust Co. v. Hannay & Co.*, [1915] 2 K. B. 537; *Russian Commercial, &c. Bank v. British Bank for Foreign Trade*, [1921] A. C. 438.

declarations binding on the executive is limited in extent and doubtful in point of expediency (*t*). But the Courts do not advise, though the Privy Council can be asked to advise on any issue preferred to it by the Crown and so acts in certain cases (*u*), including issues domestic to the United Kingdom, such as whether justices of the peace and judges need be resworn after the demise of the Crown, and it gives judgments on appeals from advisory judgments given by Canadian Courts, such as the decisive cases of the Canadian Acts on the "New Deal" (*x*). Suggestions for advisory judgments have been made at times, but not welcomed, as in 1928, when a suggestion that advisory judgments on rating issues should be allowed was indignantly rejected in the House of Lords.

**Legislative Functions.**—This function of making rules of Court is formally assigned since 1881 to a Rule Committee, which, as altered in constitution in 1909 (*y*), consists of the Lord Chancellor, the Lord Chief Justice, Master of the Rolls, four judges, and two barristers, members of the General Council of the Bar, and two solicitors, members of the Law Society, one being also a member of a provincial law society, appointed by the Lord Chancellor. They have very wide powers, but rules must be laid before Parliament (*z*). The President of the Probate Division with the assent of the Lord Chancellor and Lord Chief Justice, may also make rules for non-contentious probate business (*a*), and special powers exist as to rule making in bankruptcy (*b*) and winding up of companies (*c*). Such rules are often important, as the provision of a remedial procedure is often essential if a right is to exist effectively.

(*t*) *Dyson v. Att.-Gen.*, [1912] 1 Ch. 153. Contrast *Bombay, &c., Steam Navigation Co. v. Maclay*, [1920] 3 K. B. 402, 408.

(*u*) Cf. *Att.-Gen. for Ontario v. Att.-Gen. for Canada*, [1912] A. C. 571, 582—588.

(*x*) *Att.-Gen. for Canada v. Att.-Gen. for Ontario and Others*, [1937] A. C. 326, and the other cases there quoted.

(*y*) 9 Edw. VII. c. 11.

(*z*) Judicature Act, 1925, s. 99.

(*a*) *Ib.* s. 100.

(*b*) 4 & 5 Geo. V. c. 59, s. 132.

(*c*) 20 & 21 Geo. V. c. 23, s. 305.

## CHAPTER V.

## THE INFERIOR COURTS FROM 1307 TO 1937.

*The Courts of Petty Sessions.*

**Justices of the Peace.**—Royal jealousy of the sheriffs led to the gradual removal from them of judicial authority, and a statute of Edward IV. (*a*) took from the old criminal Court of the sheriff's tourn the power of hearing and determining criminal charges, and conferred it on the justices of the peace (*b*), who had been appointed as early as the reign of Edward I., and who had predecessors in the knights required by Richard I.'s Justiciar in 1195 to take the oaths of men over fifteen to keep the peace. Elected in the shire Courts under Edward I., they became Crown nominees under Edward III. (*c*), who assigned to them judicial functions, both of determining, with the aid of juries, felonies and breaches of the peace and of arrest and examination (*d*). From 1360 they steadily acquired a jurisdiction comparable to that of the assize judges, but after the Tudor period, when by 27 Hen. VIII. c. 5, the system was extended to Wales, capital offences were reserved for the latter (*e*). At the same time they received by statute miscellaneous powers which need not be performed at sessions, and which replaced in practice the decadent jurisdiction of the old popular Courts. But these powers were to be exercised without juries, and in the first instance, as under Henry V. in 1414 (st. 1, c. 4), the power was given on confession only to punish masters and labourers who contravened the statutes of labourers. The practice, without this restriction, was extended under the Tudors and very widely after the restoration. We hear also of special sessions, possibly precursors of the petty sessions which, as distinct from quarter sessions and powers exercised out of sessions, are due to the Summary Jurisdiction Acts, 1848 and 1879 (*f*). The issue of warrants for arrest of felons became common in the seventeenth century, and the holding of preliminary inquisitions was

(*a*) 1 Edw. IV. c. 2; C. A. Beard, *The Office of the Justice of the Peace*; Tanner, *Tudor Const. Doc.*, pp. 452—510. Their office was amalgamated with that of justices of labourers under the statutes of labourers from 1351.

(*b*) This virtually killed the tourn, though it lingered on, a mere ghost in Coke's time, to perish under 50 & 51 Vict. c. 55, s. 18 (4).

(*c*) 1 Edw. III. st. 2, c. 16.

(*d*) 18 Edw. III. st. 2, c. 2; 34 Edw. III. c. 1. The power to commit offenders for trial becomes an essential feature of criminal law, as also that of requiring bail in lieu of detention in prison until trial.

(*e*) Enacted by 5 & 6 Vict. c. 38. According to Crompton (1583), even high treason could be tried at quarter sessions.

(*f*) 11 & 12 Vict. c. 42; 42 & 43 Vict. c. 49. Lambarde (1581) records special sessions, and a form of sessions for minor offences existed by statute from 1541 to 1545. Lambarde wrote his *Eirenarcha* in 1579.

enjoined by Acts of 1554 and 1555. Both practices were placed on a sound footing in 1848 (*g*).

**Appointment of Justices.**—Some justices were so by virtue of special offices from very early times, and still remain so. Of these the principal are the King, the Lord Chancellor, and the judges of the High Court. Privy Councillors are placed on the commissions for each county. The coroner and the sheriff within their own county, and the Lord Mayor and Aldermen of the city of London are also justices of the peace. All these may commit persons breaking the King's peace, or bind them in recognisances to keep it. The justices of the peace for each county are recommended to the Lord Chancellor for appointment by the lord lieutenant, who is now advised by a committee in order to secure a fair representation of all classes and views, and to avoid protests from the Labour party, and they hold office by virtue of a special commission under the Great Seal, the form of which was settled as early as 1590 by Sir C. Wray. There is no age limit for appointment, but the Lord Chancellor can remove for misconduct. This is rare, though the power was used in the case of some justices who failed to give effect to the regulations made under the Emergency Powers Act, 1920, in the general strike of 1926. He has also used his power of suggestion to induce resignation of justices too old or unhealthy to sit. Their conduct can be called in question in Parliament without necessity of a formal motion, as in the case of judges. Originally each commission mentioned certain names of members who must be included in the number acting judicially, in order to secure some legal knowledge in the sessions, but all now are included, and the "quorum" clause is now dropped.

**Qualification of Justices.**—Justices of the peace act gratuitously, and by two statutes of Geo. II. a high property qualification was required. Later, assessment to inhabited house duty at a value of not less than £100 sufficed (*h*). The qualification by estate in the case of justices of the peace for any Court has now been abolished by the Justices of the Peace Act, 1906 (*i*); and it is also provided by the same Act, that a person may be appointed justice of the peace though he does not reside in the county for which he is appointed, provided he resides within seven miles of it.

**Constitution of the Petty Sessions.**—Any Court of summary jurisdiction consisting of two or more justices sitting in a petty sessional court house (including the Lord Mayor of London and any Alderman), or any police or stipendiary magistrate sitting in a court house at which he is authorised to do any act authorised to be done

(*g*) 1 & 2 Ph. & M. c. 13; 2 & 3 Ph. & M. c. 10; 11 & 12 Vict. c. 42. Coke, 4 Inst. 178, denied the validity of such warrants; Hale, P. C. ii, 107, asserted it; several eighteenth century statutes authorised arrest of persons accused of felony: Stephen, H. C. L. i, 190, n. 2.

(*h*) 5 Geo. II. c. 18; 18 Geo. II. c. 20; 38 & 39 Vict. c. 54; and see 45 & 46 Vict. c. 50.

(*i*) 6 Edw. VII. c. 16, ss. 1, 2. Women are eligible under 9 & 10 Geo. V. c. 71.

by two or more justices, forms a Court of petty sessions (*k*), special provision being made under the Children Act, 1908, and the Children and Young Persons Act, 1932, now consolidated in the Children and Young Persons Act, 1933, for the hearing of charges, &c., as to children and young persons under the age of seventeen in special "Juvenile Courts" established by the Acts in the metropolis and elsewhere (*l*), under conditions securing non-publication of the names of delinquents.

In the case of proceedings under the Guardianship of Infants Acts, 1886 and 1925, and the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, the Court must not be composed of more than three justices, a man and a woman being included. There is special provision for limited publication and publicity of proceedings under the Summary Procedure (Domestic Proceedings) Act, 1937.

No indictable offence may be dealt with summarily except at petty sessions, and no fine exceeding twenty shillings or imprisonment of more than fourteen days may be inflicted by any Court of summary jurisdiction other than a petty sessional Court (*m*).

**Jurisdiction of the Petty Sessional Court.**—Jurisdiction has been conferred upon magistrates in respect of the area for which they are commissioned to act by various statutes (the principal of which are the Criminal Law Consolidation Acts of 1861, and the Summary Jurisdiction Act, 1879) (*n*), to try offences in a summary way without committing to the quarter sessions or assizes. In some cases one justice alone is empowered to act; but the Court cannot properly be termed a Court of petty sessions except in cases where two or more justices must act (*o*).

Three classes of persons (*p*) come within the scope of the Summary Jurisdiction Acts:—

- (1) Children under fourteen years of age, who, except in cases of homicide, may be dealt with summarily without the consent of the parent or guardian. Not more than a fine of more than forty shillings or a private whipping of six strokes can be inflicted (*q*). Provision is made in the Criminal Justice Bill, 1939, for abolition of all forms of corporal punishment except for serious offences by prisoners, including mutiny.
- (2) Young persons between the ages of fourteen and seventeen may be dealt with summarily for larceny and other minor indictable offences if they consent to that course. Imprisonment with or without hard labour, for not more than three months, or a fine of not more than £10 may be

(*k*) Interpretation Act, 1889 (52 & 53 Vict. c. 63, s. 13 (12)). A petty sessional court-house is defined, *ib.* s. 13 (13).

(*l*) 8 Edw. VII. c. 67, s. 111; 22 & 23 Geo. V. c. 46, pt. 1; 23 & 24 Geo. V. c. 12; S. R. & O., 1933, No. 819.

(*m*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49, s. 13 (7) (8)).

(*n*) And see as to theft, 18 & 19 Vict. c. 126.

(*o*) See definition of petty sessional Court, *supra*.

(*p*) See the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49).

(*q*) Children and Young Persons Act, 1932, s. 15; by s. 19 (1) (23 Geo. V. c. 12, s. 50), no child under age eight can be guilty of any offence; for age fourteen, see Children Act, 1908, s. 131; 23 Geo. V. c. 12, s. 109. For the consolidation representing the sections of the earlier Acts in 23 Geo. V. c. 12, see the Table of Comparison issued by the Home Office, June, 1933.

inflicted (*r*). In lieu a parent or guardian may be ordered to pay any fine, damages or costs. There are special provisions as to places of detention, and for the committal to Borstal institutions of young persons up to age twenty-one (*s*), while as with other offenders, probation is often used in lieu of other penalty. The Bill of 1939 aims at abolishing prison sentences for all up to age twenty-one, with limited exceptions, for sending those between twelve and seventeen to juvenile compulsory attendance centres; for sending to Howard Houses those between sixteen and twenty-one who do not require Borstal treatment, but need disciplinary conditions outside working hours, while others can be sent for Borstal training. There is to be provision for sending those under twenty-three on remand to medical institutions for investigation, and for a wide extension of probation.

- (3) Adults, if they consent, may be dealt with summarily for a limited class of indictable offences, and sentenced to not more than three months' hard labour. An adult may, if he pleads guilty to a certain class of more serious indictable offences, be sentenced to not more than six months' imprisonment with or without hard labour (*t*). Probation may be imposed in lieu of punishment.

The principal offences in which summary jurisdiction has been given to magistrates are:—(1) small larcenies and embezzlements, and also, in cases where the property exceeds forty shillings, if the accused pleads guilty and the magistrates elect to deal with him summarily; (2) common assaults and batteries; (3) the taking of personal property, trees, animals, &c. being non-indictable larcenies; (4) small wilful injuries to property; (5) certain offences relating to game and those specified in the Criminal Justice Act, 1925, Schedule II.

Where an adult is charged before a Court of summary jurisdiction with an offence specified in the Criminal Justice Act, 1925, Schedule II., the Court may, if the accused consents, deal summarily with the offence, and if the accused pleads guilty or is found guilty, may sentence him to six months' imprisonment or a fine of £100, or to both (*u*).

**Procedure.**—The procedure is by way of information laid before the magistrate (not necessarily on oath unless a warrant for arrest is required) and summons (*x*).

(*r*) See the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 11.

(*s*) 4 & 5 Geo. V. c. 58, ss. 7, 9, 10; 15 & 16 Geo. V. c. 86, s. 46. See also Probation of Offenders Act, 1907; Prevention of Crimes Act, 1908, ss. 1 (1), 2; Criminal Justice Act, 1925, ss. 1—10.

(*t*) 4 & 5 Geo. V. c. 58, ss. 12, 13. Hard labour is dropped in the Bill.

(*u*) 15 & 16 Geo. V. c. 86, s. 24. The offences include passport offences, attempted suicide, certain coinage, telegraph and post office offences, cases of forgery, larceny, perjury, falsification of accounts, offences against the Debtors Act, 1869, Stamp Duties Management Act, 1891, indecent assaults, and issue of obscene books, &c.

(*x*) As to power of arrest under warrant, see Criminal Justice Act, 1925, s. 44.

On the day named in the summons the case comes on for hearing in open Court, except in the Juvenile Courts, whence the public is excluded. The magistrates hear the case *vidé voce*, the prosecutor and his witnesses and the defendant and his witnesses giving their evidence on oath or affirmation. Either party may be represented by counsel or attorney.

The magistrates consider the case and proceed to convict, or dismiss the summons. Judgment is then passed and punishment awarded; the judgment may be enforced by distress, or in some cases by imprisonment.

**Appeal from Petty Sessions.**—Appeal lies from petty sessions—(1) to quarter sessions. This is not as of common right, but must be by special statutes, the principal of which is the Summary Jurisdiction Act, 1879 (*y*). But under this Act no appeal is allowed where the defendant has pleaded guilty or admitted the truth of the information or complaint, or where imprisonment is inflicted for failing to comply with an order for payment of money, entering into recognisances, &c., or where a person elects to be dealt with summarily on an indictable offence (*z*). In the metropolis there is an appeal in every case (except in revenue cases) where a fine of more than £3 is inflicted. Further provision of a rather experimental kind is made by the Summary Jurisdiction (Appeals) Act, 1933. The appeal Court consists of a committee of quarter sessions, appointed annually by it, between three and twelve in number, in London the panel includes one representative of each petty sessional division and the paid chairman and deputy-chairman of quarter sessions; one of the latter may act alone. Appeals are facilitated by requiring that recognisances shall be conditioned merely to prosecute the appeal and not to pay costs, and legal aid for appellants and respondents can be provided.

(2) To the King's Bench Division of the High Court of Justice. There is a right of appeal to the High Court of Justice on the ground that the order made is *erroneous in point of law*, or is *in excess of jurisdiction* (*a*). The person injured applies to the Court to state a *special case*, and, if this is refused, he may apply to the High Court of Justice for an order, since January 1, 1939, a *mandamus*, requiring the case to be so stated. If this right be resorted to, the right to appeal to quarter sessions is lost (*b*); and by the Judicature Act, 1925, the appeal is heard by a divisional Court, whose decision can be appealed from only by leave of the Court or of the Court of Appeal (*c*).

**Jurisdiction out of Sessions.**—In many cases of offences triable summarily one magistrate alone may act, but this is not properly a petty sessions. In such a case he must sit in open Court either

(*y*) 42 & 43 Vict. c. 49; 22 & 23 Geo. V. c. 46, s. 41; 15 & 16 Geo. V. c. 86, s. 21; 23 & 24 Geo. V. c. 38.

(*z*) *Ib.* s. 19. Appeal lies from sentences imposed on persons pleading guilty under 15 & 16 Geo. V. c. 86, s. 25.

(*a*) *Ib.* s. 33; Summary Jurisdiction Rules, 1915, r. 52. An unsuccessful prosecutor can ask for a case: *Wright, Ex parte*, [1929] 2 K. B. 416.

(*b*) 20 & 21 Vict. c. 43, s. 14.

(*c*) 15 & 16 Geo. V. c. 49, s. 31.

in a petty sessional or occasional court house, and appeals lie from his decisions as in the case of petty sessions. Similarly *certiorari* lies to remove proceedings in either case into the King's Bench Division. to be quashed if defective.

**Committal for Trial.**—Persons whom it is desired to commit for trial for an indictable offence must be served with a summons, or arrested on a warrant, granted by a magistrate, or even without a warrant. The accused in any case must be brought without delay before a magistrate or magistrates for investigation, and discharge or committal with or without bail; the justices may exclude the public where this is held necessary in the interests of justice (*d*). The accused may make a statement, give evidence or tender witnesses, and counsel or a solicitor may address the Court, which must take his evidence into consideration before deciding to commit.

### *The Quarter Sessions.*

These are either the general county quarter sessions (*e*) or the borough sessions.

**The County Quarter Sessions.**—The times for holding the general county quarter sessions are fixed by the Criminal Justice Act, 1925 (*f*), and they are to be held within twenty-one days preceding or following March 25, June 24, September 29, and December 25, as the Court of quarter sessions or the justices of the county at a special meeting may from time to time fix.

**Constitution of the Court.**—All the justices holding a commission of the peace in the county may be members of the Court, but there must be at least two present to form a quorum. No legal qualification is requisite for the office of justice, despite the important work of the Court, but the chairman, elected by his fellow justices, presides and in some sense is the judge. There may be a paid chairman and deputy, as in London, Lancashire and Middlesex; if so, they serve on the appeal committee. On the application of the Court of quarter sessions the Lord Chancellor may secure the appointment by the King of a paid chairman and deputy-chairman, who must be ready to serve as chairman and member of the rating appeal committee under the Rating and Valuation Act, 1925. Where there is such a chairman, or where another justice of considerable legal status is available, the Court has a considerably extended jurisdiction under the Administration of Justice (Miscellaneous Provisions) Act, 1938 (1 & 2 Geo. VI. c. 63). The county sessions are convened by a precept of two justices

(*d*) 11 & 12 Vict. c. 42, s. 19; 15 & 16 Geo. V. c. 86, ss. 11—14. The accused was given the right at this stage to call witnesses by 30 & 31 Vict. c. 35, s. 3. If bail is refused, application can be made to the High Court. Bail should be granted where there is no serious doubt that the accused will appear at the Court. It must be given in most cases of misdemeanour. Before taking a charge, the police officer investigating may release on recognisances: 15 & 16 Geo. V. c. 86, s. 45.

(*e*) For the justices, see p. 288, *ante*. Quarterly sessions are prescribed in 12 Ric. II. c. 10.

(*f*) 15 & 16 Geo. V. c. 86, s. 22. The appeal committee can act at any time: 23 & 24 Geo. V. c. 38, s. 7 (2).

of the peace of the county, or of the *custos rotulorum* (keeper of the records) and one justice, addressed to the sheriff, requiring him to summon the sessions on the day named, and to give notice to coroners, gaolers, stewards, &c. in his bailiwick, and to return a petty jury, the use of grand juries having been abolished in 1933 (*g*).

**Jurisdiction of the Court.**—The Court of quarter sessions may try appeals from petty sessions, and appeals on issues of rating (*h*), licensing (*i*), the poor law, lunacy (53 Vict. c. 5, ss. 301—313), and town planning (22 & 23 Geo. V. c. 48). Further, it has an extensive jurisdiction in all criminal matters except those excluded by statute, of which the principal were treason, murder or any capital felony, forgery, certain conspiracies, frauds by trustees, and others punishable under the Larceny Act, 1916, bigamy, abduction, rape, or any felony for which a person not previously convicted is subject to penal servitude for life (*k*). Its jurisdiction has recently been enlarged, and it now has jurisdiction to try a person charged with any of the offences specified in the First Schedule to the Criminal Justice Act, 1925 (*l*), which includes unlawful combinations and conspiracies to cheat and defraud, offences under the Malicious Damage Act, 1861 (ss. 16, 17), the Criminal Law Amendment Act, 1885 (s. 13), the Post Office Act, 1908 (ss. 50—56), the Perjury Act, 1911 (s. 5), and certain offences under the Forgery Act, 1913, and Larceny Act, 1916. The justification of this extension is not wholly admitted, as the cases involved may need careful exposition by a trained lawyer, but this point may be met by providing county quarter sessions with paid chairman legally qualified, as is now possible under the Act of 1938 above cited. Much is done by the Court of Criminal Appeal to guide the lower Courts.

**Appeal from Quarter Sessions.**—An order, on motion, made in a summary way, may be removed into the King's Bench Division on order of *certiorari*, and there either quashed or confirmed. But an indictment found at quarter sessions could only be removed into the King's Bench Division on writ of *certiorari* on the ground that a fair and impartial trial could not be had in the Court below, or that some difficult question of law or fact was likely to arise, or that a special jury or view of premises might be required. Under the Administration of Justice (Miscellaneous Provisions) Act, 1938 (s. 11), the rule is normally that no indictment can be removed into the King's Bench, except on the direction of that Court. All appeals which lie from

(*g*) Administration of Justice (Miscellaneous Provisions) Act, 1933 (23 & 24 Geo. V. c. 36), s. 1.

(*h*) The appeal lies from the assessment committee of the county council or other rating authority, but only in respect of matters which could not be raised before the committee.

(*i*) 10 Edw. VII. & 1 Geo. V. c. 24. Liquor licences are granted by petty sessions, confirmed by the county licensing committee selected by the justices in quarter sessions. Appeals from refusals to renew or transfer licences lie to quarter sessions, which controls the compensation fund, obtained by a levy on licence holders, whence payment is made on the extinction of a licence on the score of redundancy. From borough licensing committees reference lies to the whole body of justices.

(*k*) 5 & 6 Vict. c. 38.

(*l*) 15 & 16 Geo. V. c. 86, s. 18.

quarter sessions are to go before a Divisional Court of the High Court of Justice (*m*).

On an appeal from a Court of summary jurisdiction either party may apply to the Court of quarter sessions within seven days to have a case stated for the opinion of the High Court on a point of law (*n*).

Every case stated by a Court of quarter sessions otherwise than under the Crown Cases Act, 1848, or Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), for the consideration of the High Court, shall be deemed to be an appeal and be heard accordingly (*o*).

Appeal now lies to the Court of Criminal Appeal under the Criminal Appeal Act, 1907, on convictions on indictments, criminal informations, and cases dealt with by quarter sessions under the Vagrancy Act, 1824, as previously stated.

**Borough Sessions.**—Many boroughs have their own quarter sessions (*p*) independently of the general quarter sessions held once in each quarter. The recorder of the borough (who must be a barrister of five years' standing) is appointed by the Crown on the recommendation of the Home Secretary during good behaviour, and is the sole judge, but he may have an assistant, and in case of absence may appoint a deputy. Their jurisdiction is practically the same as that of the county sessions, but licensing appeals lie to county quarter sessions. The recorder may at any date sit to hear appeals or constitute a second Court under an assistant to hear appeals.

#### *The Central Criminal Court.*

This Court was constituted in 1834 (*q*), and its jurisdiction was to extend to indictable offences in London and Middlesex, and in certain parts of Essex, Kent, and Surrey. The Central Criminal Court acts monthly as the assize Court for these districts (*r*), and before it all indictments not triable at quarter sessions within the above districts are laid; the Court also sits as the Court of quarter sessions for the City of London. Amongst others the following persons are judges: the lord mayor of London, the lord chancellor, all the judges of the High Court of Justice, the aldermen, the recorder, who is appointed by the Court of aldermen, with royal approval, the common serjeant of the City of London, and the judges of the Mayor's and City of London Court, and also such persons as the Crown from time to time appoints. To any of these persons the Crown delivers from time to time commissions of oyer and terminer and of goal delivery to try all treasons, murders, felonies, and misdemeanours committed within

(*m*) Judicature Act, 1925, s. 63.

(*n*) 15 & 16 Geo. V. c. 86, s. 20.

(*o*) 15 & 16 Geo. V. c. 49, s. 25.

(*p*) Separate quarter sessions are now granted on the recommendation of the Home Secretary on the petition of the borough council under the Municipal Corporations Act, 1882, s. 162. Originally they depended on royal grant. About 123 boroughs have such sessions. For procedure, see 45 & 46 Vict. c. 50, ss. 166—168; on appeal, 23 & 24 Geo. V. c. 38, s. 7 (7), (8).

(*q*) 4 & 5 Will. IV. c. 36; and see 33 & 39 Vict. c. 79; 51 & 52 Vict. c. 41.

(*r*) As to the times of sitting, see 4 & 5 Will. IV. c. 36, s. 15; 44 & 45 Vict. c. 58, s. 18; 15 & 16 Geo. V. c. 49, c. 74. *Mandamus* does not lie to it as a superior Court: *R. v. Central Criminal Court (Justices)* (1883), 52 L. J. M. C. 121.

the district of the Central Criminal Court. All serious crimes are tried by a judge, though an alderman or lord mayor sits with him. The Court has also jurisdiction over offences committed on the high seas under s. 15 of the Act of 1834, and the King's Bench Division may remove to it indictments for offences committed outside its jurisdiction (s). It can try persons accused of murder in England under the Army and Air Force Acts (t). *Certiorari* lies to the Central Criminal Court from the Courts of quarter sessions within the district, and an indictment found at the Central Criminal Court may be removed into the King's Bench Division of the High Court by its direction under the Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 11.

Courts of quarter sessions within the above districts may also transmit cases to be heard by the Central Criminal Court.

By the Judicature Act, 1925, s. 73, the jurisdiction may be extended by Order in Council to any adjoining county or part of a county.

### *The Coroner's Court.*

It seems clear that coroners existed at any rate as early as the reign of Richard I., and their duties were defined by the 4 Edw. I. st. 2. They were forbidden by Magna Carta (c. 24) to hold pleas of the Crown, but seem to have continued to hold such pleas as might be tried in the County Court. It seems that their origin is due to the desire to put bounds to the power of the sheriffs; that before 1181 officers were appointed in each hundred to hold Crown pleas; and that in 1194 in lieu a smaller number for counties was provided for. Until 1888 the coroner was elected by the freeholders in the County Court, but by the Local Government Act, 1888 (u), the county council are made the electors, except in boroughs having a separate Court of quarter sessions and whose population exceeds 10,000, where they are appointed by the borough council (x). Under the Coroners (Amendment) Act, 1926, coroners in future must be barristers, solicitors, or medical practitioners of at least five years' standing. There are to be no more franchise coroners, save the King's coroner, the coroners of the royal household, and the Scilly Isles, and the coroner for the City of London, who by statute holds inquests into fires which may return a verdict of arson (y). High Court judges are coroners *ex officio*, but do not act. Power to remove for inability or misconduct rests with the Lord Chancellor.

The coroner's principal duties now are to hold inquests in cases of suspicious deaths. In such a case the coroner (on notice of the death) issues his warrant for the summoning of a jury, who must

(s) 19 & 20 Vict. c. 16, ss. 1, 3. The Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 11, provides that the King's Bench can order the trial of any indictment or inquisition at the Central Criminal Court before three Judges of the King's Bench Division.

(t) 24 & 25 Vict. c. 5. See also 1 & 2 Geo. V. c. 28, s. 10.

(u) S. 5.

(x) 45 & 46 Vict. c. 50, s. 171; 51 & 52 Vict. c. 41, s. 38 (2).

(y) 51 & 52 Vict. c. xxxviii.

not number more than eleven or less than seven (z). There is, however, power to hold the inquest without a jury in certain cases (a). The body must be viewed by the jury if the coroner so directs or if a majority of the jury so desires (b). The inquest is then held *super visum corporis*, and the witnesses are examined on oath, and on the jury with not more than two dissentients finding a verdict of murder or manslaughter against the accused, the coroner may accept the verdict and must commit him if present, if not, issue a warrant for his arrest. This finding is equivalent to the finding of the former grand jury, and the accused may be prosecuted as on an indictment. But it is an invariable practice (though not necessary) to take the accused before a magistrate, who then commits the prisoner, the trial taking place on indictment in the usual way. If a charge has already been made, he now adjourns his inquest, thus avoiding idle duplication. The Home Secretary may order an inquest where the body is missing; this occurred in 1933. It is, of course, possible to convict of murder, even if the body cannot be found.

In addition to his duty of holding inquests in cases of suspicious deaths, the coroner has jurisdiction to hold inquests in cases of treasure trove, who were the finders, where it is, and whether any person is suspected of having concealed it (c). Formerly, also, the coroner had jurisdiction in cases of shipwrecks; but by the Merchant Shipping Acts, 1854, 1862, and 1894, the general superintendence of matters relating to wrecks has been handed over to the Board of Trade.

The coroner also held inquests on royal fish (viz., whales or sturgeon caught on or near the coast), but this jurisdiction was taken from him by the Coroners Act, 1887, together with his jurisdiction relating to wrecks (d). He has also lost his medieval functions of receiving appeals or accusations of crime, of arresting criminals, of recording outlawries, and of receiving the declarations of approvers and abjurations of criminals who took sanctuary and of securing the pecuniary interests of the Crown in the goods of felons and suicides.

Further, we may note that a coroner becomes a magistrate *virtute officii*; also, he is the sheriff's substitute in executing process when exception has been taken to the sheriff on the ground of partiality or for some other cause.

### *The Metropolitan Police Courts.*

The necessity of paid justices in great cities was felt early, and in the eighteenth century one justice at least was usually paid from secret service funds, as was Henry Fielding at Bow Street. In 1792 the

(z) The Coroners Act, 1887 (50 & 51 Vict. c. 71), s. 3, provided for from twenty-three to twelve members, and twelve must concur. Originally the jury came from the four adjacent villis with twelve from the hundred.

(a) Coroners (Amendment) Act, 1926, s. 13. If murder, manslaughter, or infanticide is suspected, a jury is needed. For the rules governing coroners and the power of King's Bench to order a new inquest before another coroner, see *R. v. Divine*; *Walton*, *Ex parte*, [1930] 2 K. B. 29.

(b) Coroners (Amendment) Act, 1926, s. 14.

(c) 50 & 51 Vict. c. 71, s. 36. See p. 380, *post*.

(d) *Ib.* s. 44. For the old jurisdiction, see Select Coroners' Rolls (S. S.).

system was extended and eight public offices were set up. Of these there are now fourteen in and about the metropolis (area 442,778 acres, 8,655,000 population), together with seven juvenile Courts, presided over by metropolitan police magistrates, appointed and removed by the Secretary of State for Home Affairs, who form a Court of petty sessions sitting alone. They are usually expected to retire at age seventy, but an extension up to age seventy-two is possible. The powers and duties of these magistrates and the various officers connected with the Courts are regulated by a number of statutes passed in and after the reign of Victoria, especially the Metropolitan Police Courts Acts, 1839, 1840 and 1897.

In addition to the metropolitan magistrates, stipendiary magistrates have been appointed since 1813 (*e*) for various towns in different parts of the kingdom, and their duties correspond to those of the metropolitan police magistrates. Application is made by the council to the Home Secretary, who approves salary, &c.

### *The County Courts.*

**Constitution.**—The old shire-mote, or County Court of the sheriff, fell into disrepute owing to the dilatory nature of its proceedings, and to the fact that it was not a Court of record. The remedy afforded by the superior Courts in debts and demands of small amount was almost equally objectionable; therefore, on the model of the Court approved by Act of 1606 for London, in the eighteenth century Courts of *Request* or of *Conscience* were formed by special statutes in different parts of the Kingdom or otherwise, like the Court of Conscience in the Guild Hall (1518), to take cognisance of small causes; they had useful features, such as trial without jury and acceptance of the parties as witnesses. These were, however, found inadequate for the purpose, and in 1846 the first County Courts Act was passed, which abolished the Courts of Request or Conscience and substituted the new County Courts (*f*).

There was also a provision in the Act enabling the lord of any hundred, honour, manor, or liberty, being entitled to hold a Court in right thereof, to surrender to the Crown the right of holding such Court, and this provision was further extended in favour of the County Courts by the County Courts Act, 1867 (*g*), which provided that any action which could be brought in a County Court should not be commenced in any inferior Court not being a Court of record.

Several acts amending and extending the Act of 1846 were subsequently passed, and in 1888 a great consolidating Act (51 & 52 Vict. c. 43) was passed, by which as amended in 1919 and 1927 and consolidated in 1934 (24 & 25 Geo. V. c. 53), the County Courts are now principally regulated.

(*e*) See 5 & 6 Will. IV. c. 76; 12 & 13 Vict. c. 18; 21 & 22 Vict. c. 73; 26 & 27 Vict. c. 97; 6 Edw. VII. c. 46; for powers, 11 & 12 Vict. c. 42, s. 29; c. 43, s. 33; 42 & 43 Vict. c. 49, s. 20 (10); for appointment, see 45 & 46 Vict. c. 50, s. 161.

(*f*) 9 & 10 Vict. c. 95. County Courts for Middlesex had been created by 23 Geo. II. c. 33, and commended by Blackstone, *Comm.*, iii, 82, 83. In them the clerk (a barrister) and the suitors of the old Court did justice in small causes.

(*g*) 30 & 31 Vict. c. 142.

The general system instituted by these Acts is as follows: a certain number of County Court *districts* are appointed in each county, the Court in each district being held once a month generally, and being a Court of record. To each district a judge is appointed by the Lord Chancellor; he must be a barrister of seven years' standing, and in good health. Retirement is at age seventy-two with possible extension by the Lord Chancellor to age seventy-five. In the case of districts in part or whole within the Duchy of Lancaster the appointment and removal rests with the Chancellor of the Duchy, who must also consent to alterations and additions to Duchy districts.

**Procedure.**—Procedure is simple, by plaint followed by summons, and summary trial by the judge. The judge determines all questions of law and of fact, unless a jury is summoned. The provisions with regard to juries are now as follows:—

- (a) No jury is allowed in Admiralty proceedings, in proceedings under the Rent and Mortgage Interest Restrictions Acts, 1920 to 1938, or in appeals under the Housing Act, 1930, s. 22 (now 1936, s. 15).
- (b) In other cases trial is without jury unless otherwise ordered on application by a party. If the claim involves a charge of fraud against the applicant or is a claim of libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise, jury trial is to be ordered, unless there is involved prolonged examination of documents or accounts, or a scientific or local investigation which cannot be made conveniently with a jury. In any other case the Court has full discretion (*h*).

This jury consists of eight (*i*) persons being qualified to serve on a jury in the High Court of Justice, and their verdict must be unanimous. An order for payment having been made and not complied with, execution issues against the goods of the debtor. If the judgment debtor has no goods, a judge of the High Court may order a writ of *certiorari* to remove the judgment into the High Court, when a writ of *elegit* can issue against the debtor's lands.

On any point of law or equity, or on the admission or rejection of evidence, either party may appeal to the Court of Appeal unless both parties have previously agreed in writing that the decision shall be final. Generally speaking, in actions of contract or tort, the right of appeal does not exist (except by leave of the judge, and in cases respecting the title to real property) where the amount claimed is not above £20. In Admiralty causes an appeal on fact is allowed when the value exceeds £100.

**Jurisdiction.**—This is principally for debts, demands, and damages of small amount, and includes all personal actions in contract or tort, where the claim does not exceed £200 (*k*). But the defendant may give

(*h*) County Courts Act, 1934, s. 91.

(*i*) *Ib.* s. 93.

(*k*) *Ib.* s. 40; increased to £200 by 1 & 2 Geo. VI. c. 63, s. 16.

notice of objection whereon the judge must order transfer to the High Court. The plaintiff may, however, abandon part of his claim, but the excess over £200 is thereby surrendered. But, if the claim exceeds £20 in contract, or £10 in tort, the defendant may object to the case being tried by the county Court, and on giving the proper security, up to £150, and obtaining a certificate from the judge that some difficult question of law or fact is likely to arise, he may have the cause removed into the High Court of Justice. The County Court alone takes cognisance of cases under the Employers' Liability and Workmen's Compensation Acts, and the Agricultural Holdings Act, 1923. Some personal actions are, except by consent, expressly excluded from the jurisdiction of the County Court, unless remitted by the High Court (*l*); such are breach of promise of marriage, libel, slander, seduction, or actions in which the title to any hereditament or to any toll, fair, market, or franchise is in question. A patent is a "franchise," therefore the validity of a patent cannot be tried in the County Court. The Court also has jurisdiction to try any cause assigned to the King's Bench Division where the parties (or their solicitors) sign a memorandum in writing, agreeing to have the cause so tried. With regard to realty, actions for recovery of land may be brought where neither the value nor the rent of the tenement exceeds £100 yearly. Moreover, actions where the title to any corporeal or incorporeal hereditament comes into question may be tried in the county Court where neither the value nor rent exceeds £100 yearly (*s. 48*).

The County Court has no jurisdiction to try an action brought on a judgment in the High Court, nor the High Court to try an action brought on a judgment in the County Court.

Further, a judge of the High Court of Justice may in certain cases, on the application of either party, remit the cause to the County Court. Certain penalties with regard to costs are imposed by the Act in the case of a plaintiff bringing an action in the High Court which might have been tried in the County Court (*m*). But this rule does not apply to Crown claims for debts, which can be brought in the County Court under the Administration of Justice (Miscellaneous Provisions) Act, 1933 (*s. 4*).

**Equitable Jurisdiction.**—By the Act of 1934 the County Courts may try (a) administration actions where the value of the estate does not exceed £500; (b) suits for the execution of trust in estates up to £500; (c) foreclosure and redemption actions, or actions for enforcing any mortgage, charge, or lien, where the amount of the charge does not exceed £500; (d) specific performance and rectification

(*l*) County Courts Act, 1934, *s. 40* (*1*) (*c*).

(*m*) 51 & 52 Vict. c. 43, *s. 116*; 9 & 10 Geo. V. c. 73, *ss. 11, 12*; 15 & 16 Geo. V. c. 23, *s. 20*; County Courts Act, 1934, *s. 47*. The regularity of County Court proceedings can be tested by *certiorari*: *R. v. Kent County Court Judge*; *Ferridge, Ex parte*, [1932] 2 K. B. 535. The High Court can punish contempt of a County Court consisting in obstruction of a sale ordered by the Court: *R. v. Edwards*; *Welsh Church Temporalities Commissioners, Ex parte* (1933), 49 T. L. R. 383. The Court of Appeal may reverse an order of a judge transferring an action to the County Court if difficult questions of law will arise: *Phillips v. Lloyd & Sons, Ltd.*, [1938] 2 K. B. 282 (C. A.). See also *Berridge v. Everard* (1933), 54 T. L. R. 462.

of agreements where the property sold or leased does not exceed £500 in value; (e) maintenance, or advancement of infants whose property does not exceed £500; (f) dissolution or winding-up of partnerships, the assets not exceeding £500; (g) suits for relief against fraud or mistake, where the damages or the estate or fund do not exceed £500.

**Admiralty Jurisdiction.**—In 1868 certain County Courts in the neighbourhood of the sea were given a limited jurisdiction in Admiralty as to salvage, towage, necessities or wages, damage to cargo or by collision, agreements for the use or hire of ships, claims with respect to the care of goods carried in ships, or any claim in tort with respect to such goods, and these powers can be given by the Lord Chancellor to such Courts as he thinks proper (*n*). A number of Courts have this authority, whose exercise is now ruled by Order XXXV. of the County Courts Rules, 1936. Such Courts have jurisdiction in salvage of air navigation under Order in Council of February 24, 1938, under 26 Geo. V. & 1 Edw. VIII. c. 44.

**Bankruptcy and Winding up of Companies Jurisdiction.**—In 1869 certain County Courts were given jurisdiction in bankruptcy, and this was confirmed by the Bankruptcy Act, 1914, s. 96, which authorises the Lord Chancellor to decide which Courts shall have jurisdiction, and by s. 103 the County Court may exercise, with regard to all causes of action within its jurisdiction, all the powers of the High Court. The Companies Act, 1929, s. 163, applies similar principles to the winding up of companies, following provisions of 1890.

**Rules.**—Rules may be made for the Courts by a committee, appointed by the Lord Chancellor, composed of five judges of county Courts, a barrister, a registrar and a solicitor. He may alter or disallow any proposed rules; subject to the concurrence of the rule-making authority of the High Court, he fixes the date of their taking effect. A complete new Code of Rules was passed on July 29, 1936.

### *Inferior Courts.*

By the Judicature Act, 1925, s. 201, the Crown may from time to time by Order in Council confer on any inferior Court of civil jurisdiction the same jurisdiction in equity and in admiralty as any County Court has. No use has yet been made of this power. By s. 202 every inferior Court "which has jurisdiction in equity or at law and in equity and in admiralty" shall grant such relief as ought to be granted in the like case by the High Court. By Order in Council under the Moneylenders Act, 1927, the jurisdiction under that Act has been conferred on the Liverpool Court of Passage and some other Courts. By s. 208 the Crown may by Order in Council direct that the enactments relating to appeals from County Courts shall apply to any other inferior Court of record. So far this has not been done

(*n*) 31 & 32 Vict. c. 71; 32 & 33 Vict. c. 51; County Courts Act, 1888, s. 3; 57 & 58 Vict. c. 60, s. 547; 9 & 10 Geo. V. c. 73, s. 13; County Courts Act, 1934, ss. 55—57.

generally, but there is such provision for the Liverpool Court of Passage and the Derby Court of Record under local Acts (11 & 12 Geo. V. c. lxxiv., and 17 & 18 Geo. V. c. xcii.). If no provision is made, appeal lies to the King's Bench Division (o). The principal inferior Courts other than county Courts are certain Courts of record which have power by ancient charters to exercise jurisdiction in certain suits. Of these the chief are the Mayor's and City of London Court; the Derby Borough Court of Record, to which the County Rules were applied in 1927 under the Derby Corporation Act, 1927 (17 & 18 Geo. V. c. xcii.); the Liverpool Court of Passage; the Preston Court of Pleas; the Salford Hundred Court of Record; and the Oxford University Chancellor's Court (p). There are also of historical interest the Barmote Court in High Peak, Derbyshire (14 & 15 Vict. c. 94), Bristol Courts of Tolzey and Pied Poudre, the Cambridge Court of Pleas, the Chester Courts of Pentice and Portmote, the Colchester Law Hundred and Foreign Courts, the Exeter Provost Court, the Great Yarmouth Borough Court, the Newark Court of Record, the Newcastle-upon-Tyne Burgess and Non-Burgess Courts, the Northampton Court of Record, the Norwich Guildhall Court, the Poole Civil Court of Record, and the Scarborough Court of Pleas; there is, however, power under the County Courts Acts (s. 187 of that of 1934) to exclude jurisdiction of the local Court where the cases are within the jurisdiction of a county Court, and this power has been used against the Ipswich Court of Small Pleas, the Worcester and the York Courts of Record, while the Salford Hundred Court is restricted by the Act of 1911 to the Hundred area therein defined. The Kingston-upon-Hull Court of Record was abolished in 1929 (19 & 20 Geo. V. c. lxxxiii., s. 75). The Administration of Justice Act, 1925, s. 19, makes provision for trial with jury in certain cases in inferior Courts of civil jurisdiction.

#### *The Mayor's and City of London Court.*

The Court of the Portreeve in London existed in very early times, and it seems that this split up about the reign of Henry III. into the Court of Hustings and the Lord Mayor's Court. The lord mayor and all the aldermen were the judges, the recorder sitting by custom as sole judge, and in his absence the common serjeant (g). An assistant judge was provided for under the Local Courts of Record Act, 1872, s. 7. There are now two judges in addition to the recorder and the common serjeant under the Act 10 & 11 Geo. V. c. cxxxiv.

The Court enjoys an extensive legal and equitable jurisdiction, but apart from statute, under which it has jurisdiction in causes up to value £50 where the defendant resides or carries on business

(o) *Darlow v. Shuttleworth*, [1902] 1 K. B. 721.

(p) Salford has local legislation: 31 & 32 Vict. c. cxxx; 1 & 2 Geo. V. c. clxxii: so has Oxford: 25 & 26 Vict. c. 26; *Ginnett v. Whittingham* (1886), 16 Q. B. D. 761; that of Cambridge is obsolete since 19 & 20 Vict. c. xvii; J. Williams, *Law of the Universities*. For Liverpool, see 11 & 12 Geo. V. c. lxxiv, ss. 244—263.

(g) They or either of them might in certain cases appoint a deputy (Mayor's Court Procedure Act, 1857, s. 43).

in the city, this jurisdiction only embraces causes arising wholly within the limits of the city. This jurisdiction is concurrent with that of the High Court.

Appeal lay in certain cases, as above noted, to a Divisional Court of the High Court of Justice; in others to the Court of Appeal, *i.e.*, in proceedings within County Court jurisdiction, or application may be made to the Mayor's Court for a new trial (*r*). The normal appeal is to the Court of Appeal under the Administration of Justice (Miscellaneous Provisions) Act, 1938 (s. 15).

The Court enjoyed special forms of procedure, principally regulated by the Mayor's Court Procedure Act, 1857 (*s*). The Mayor's Court and the City of London Court, which had a limited jurisdiction, are now amalgamated and form one Court which has all the powers and jurisdiction of both Courts, and by Rules of 1921 adopts the procedure of the Supreme Court down to judgment (*t*).

### *The Court of the Stannaries.*

From the thirteenth century at least the Crown enjoyed certain royal rights over the mines in Devonshire and Cornwall, and in 1201, John, by charter, apparently for the first time, made the miners in those districts subject, save in pleas of life, member, or land, to the jurisdiction of the Courts of the Stannaries, separate Courts existing for the district of the Stannaries in Cornwall and the districts of the Stannaries in Devon. This jurisdiction was recognised by various charters in early times (*u*), and the officials of the Court consisted of the lord warden, appointed by the Duke of Cornwall, the vice-warden and stewards, selected by the lord warden.

A Court was held by the steward of the Court and a jury of six every three weeks (*x*), and appeal lay to the vice-warden, who also exercised an equity jurisdiction, adjudged legal in *Vice v. Thomas* (1842), and thence to the lord warden, with a final appeal to the Prince in Council (*y*). Error did not lie to the Courts of common law, but prohibition lay. The Devonshire Stannary Courts seem to have gradually fallen into disuse, whilst in Cornwall the Court of the vice-warden alone seems to have attracted any suitors. The vice-warden assumed without authority a common law jurisdiction; this was held invalid in 1824. Eventually the vice-warden's Court in Cornwall

(*r*) See Glyn & Jackson, *Mayor's Court Practice*, pp. 138 ff.; 15 & 16 Geo. V. c. 49, s. 24; County Courts Act, 1934, s. 184; *Bowater & Sons, Ltd. v. Davidson's Paper Sales, Ltd.*, [1936] 1 K. B. 465.

(*s*) 20 & 21 Vict. c. clvii.

(*t*) 10 & 11 Geo. V. c. cxxxiv. For its Admiralty jurisdiction, see *The James and the Champion* (1933), 50 T. L. R. 39.

(*u*) See Smirke's Rep. of *Vice v. Thomas*, App., p. 15; Holdsworth, i, 151—165. Edward I. confirmed the grant in 1305, Henry VII. in 1508; 16 Car. I. c. 15. Cf. S. R. Lewis, *The Stannaries*, p. 126.

(*x*) *Ib.* At spring and autumn great Courts a leet jurisdiction was exercised. The affairs of the Stannaries were regulated by Parliaments, perhaps self-created, but recognised in 1508 by Henry VII. Records of the Cornish Parliament exist from 1588 to 1752; the Devon Parliament was in being in 1588, but early decayed.

(*y*) The Duchy of Cornwall and the Stannary jurisdiction were granted by Edward III. to the eldest son of the reigning Sovereign. See *Trewynard's Case* in Chancery (1562) and *Star Chamber* (1564), Tanner, *Tudor Const. Doc.*, pp. 355, 356.

was reconstituted in 1836 and 1855 (z) with jurisdiction over the Stannaries in Devonshire, and appeal to the lord warden with three legal assessors chosen from the Privy Council, and thence to the House of Lords.

By the Judicature Act, 1873, the appellate jurisdiction of the lord warden's Court was merged in that of the Court of Appeal; whilst in 1896 the Court of the vice-warden was abolished, and its powers transferred to the County Court of Cornwall at Truro having bankruptcy jurisdiction (a).

*The Courts of the Counties Palatine of Chester, Durham, and Lancaster.*

These were, properly speaking, not inferior Courts, as full *jura regalia* or rights of administering royal justice were granted to them originally, to the exclusion of the King's writ (b). But Acts of Parliament bound the territories, unless they were specially exempted.

The county palatine of Durham was granted by the Conqueror to the then Bishop of Durham; it was transferred to the Crown in 1836 (c) as a separate franchise, but annexed to the Crown absolutely in 1858.

The county palatine of Chester was granted by the same King to Hugh Lupus, his nephew, but reverted to the Crown under Henry III. Richard II. conferred it as a principality on the King's eldest son.

The county palatine of Lancaster was granted by Edward III. in 1377 to John of Gaunt; in 1461 it became permanently annexed to the Crown. Under Henry VII. it was definitely assigned a position as a distinct estate of the Crown, as under Henry IV.

The King's writ did not run into the counties palatine, all writs and indictments of treason and felony running in the name of him who had the county palatine, and the latter pardoned offences and appointed all justices of eyre, of assize, and of the peace within the jurisdiction of the Court of the county palatine. But this was altered under Henry VIII., who asserted the right to pardon and to appoint, and secured the framing of the writs in the royal name (d).

Still, the ordinary royal writs did not run into these counties, the writs being issued from Westminster to the chancellor of the county palatine, who issued his mandate to the sheriff; the assizes also sat there by virtue of a special commission from the Crown as owner of the franchise, under the seal of the chancellor of the particular county palatine. In the year 1830 the 11 Geo. IV. & 1 Will. IV., c. 70, abolished the offices of chief justice and second justice of Chester and enacted that assizes should be held in Chester as in other places, and by the Judicature Act, 1873, s. 99 (e), the jurisdiction of the Courts of Common Pleas of Lancaster and Durham was vested in

(z) 18 & 19 Vict. c. 32, re-enacting 6 & 7 Will. IV. c. 106.

(a) 59 & 60 Vict. c. 45; Order in Council, December 16, 1896.

(b) These counties palatine were separate kingdoms or principalities in themselves, and seem to have been created as a means of defence against the neighbouring Welsh and Scots. See G. T. Lapsley, *The County Palatine of Durham* (1900).

(c) 6 & 7 Will. IV. c. 19; 21 & 22 Vict. c. 45, s. 5.

(d) 27 Hen. VIII. c. 24.

(e) 15 & 16 Geo. V. c. 49, s. 70 (6).

the High Court of Justice, and by the same Act the counties palatine of Durham and Lancaster were to cease to be counties palatine as regards the issue of commissions of assize or other like commissions but no further. The Chancery jurisdiction of Durham and Lancaster therefore still remains, and under the Judicature Act, 1925, s. 28, appeal lies to the Court of Appeal.

### *The Council of the North.*

Henry VIII. in 1537, after the northern insurrection, established a council with jurisdiction over Yorkshire and the four northern counties. Strafford as president extended its control and added to its unpopularity, and it was swept away by the Long Parliament (f). It had exercised an equity jurisdiction. A council has been traced back to Richard II. in 1484.

### *The Welsh Courts.*

In the time of Edward I. six counties in Wales had Courts of justice on the English pattern. The rest of Wales was subject to the despotic authority of lords marchers, and into their lordships the King's writ did not run. By two statutes of Henry VIII. (1535 and 1543) (g), the lords marchers' powers were abolished and Wales was divided into counties with Courts of Great Session of its own. The Act of 1543 also defined the jurisdiction of the Council of Wales which had existed since Edward IV.; it exercised a criminal jurisdiction analogous to that of the Star Chamber, and a civil jurisdiction parallel to that of the Courts of Great Session. It fell into abeyance in the seventeenth century and was abolished in 1689 (h) as far as concerns civil jurisdiction, while in 1641 its criminal jurisdiction had been destroyed by the Long Parliament (i).

In 1830 (11 Geo. IV. & 1 Will. IV. c. 70) the separate jurisdiction of the principality of Wales was abolished, and Wales was included in the English judicial system.

### *Various Obsolete Courts.*

**The Law Merchant.**—In early times the law relating to merchants' transactions, on land and sea, and in particular to foreign merchants, did not form part of the general common law, but was essentially a legal system based on European mercantile usage, analogous to the

(f) 16 Car. I. c. 10; R. R. Reid, *The King's Council in the North* (1921); Tanner, *Tudor Const. Doc.*, pp. 214—221.

(g) 27 Hen. VIII. c. 26; 34 & 35 Hen. VIII. c. 26. The jurisdiction rested on prerogative, but was reinforced by 26 Hen. VIII. c. 6; C. A. J. Skeel, *The Council in the Marches of Wales* (1904). A Council of the West existed in 1540 (32 Hen. VIII. c. 50), but early disappeared: *Tudor Const. Doc.*, p. 335.

(h) 1 Will & M. c. 27.

(i) 16 Car. I. c. 10. Under the Statutum Wallie, 1284, Wales was annexed to the Crown, the King retaining power to legislate; in 1536 it was united with England by 27 Hen. VIII. c. 26; the King's power to legislate was taken away by 21 Jac. I. c. 10, s. 4. After union the English Courts gradually asserted power to issue writs to Wales: *Whitrong v. Blaney* (1677), Vaughan's Rep. 395; *Penry v. Jones* (1779), 1 Doug. 213.

law of the seas. This form of law was administered in particular Courts, such as the *Courts of the Staple* attached to certain staple towns, the *Courts of Pied Poudre* attached to fairs and markets, the *Court of Policies of Assurance* in London, besides the various Courts having Admiralty jurisdiction.

These Courts were essentially intended to do speedy justice in issues affecting foreign traders; Edward I. enjoined this for the great towns by the Statute of Acton Burnel, 1283, and the Statute of Merchants, 1285, and Edward III. in the Statute of the Staple insists on justice being done from day to day, excludes the King's judges from intervention, and enjoins the Chancellor and Council to give redress for wrongs not remedied in the Staple Court (*k*); the Chancellor applied the law of nature, the universal law merchant (*l*). From this law came the rules of bills of exchange (negotiability and days of grace), bills of lading, the contract of affreightment, average, bottomry, respondentia, letters of credence, policies of assurance, assignments of debt, and other matters. The parties were accepted as in Chancery as essential witnesses, and possession, as in sale in market overt, was accorded high value. The common law as modified and the common law Courts became predominant by 1600 as regards internal trade, by 1700 as regards foreign trade.

This was facilitated by the development of the form of action on the case on the custom of merchants, the litigant showing that he was a merchant and pleading the custom in the particular transaction involved (*m*). Towards the end of the seventeenth century a plea that the litigant was a merchant ceased to be necessary, but the whole case was left at large to the jury (*n*). The use of the fiction that a foreign place was "apud St. Mary le Bow in Chepeside" was adopted to get over the original inability of the Courts of common law to deal with things happening overseas, and it served to counter the often equally fictitious allegation of the libel in Admiralty proceedings that the transactions had taken place "*super altum mare*"; thus from the end of the sixteenth century the common law Courts could deal with foreign trade issues (*o*).

Staple towns dated from the reign of Edward I. (*p*), and were the only towns permitted by charter to deal with foreign merchants in the staple articles of commerce, such as wool, woollfells, leather, &c. The Statute Merchant (13 Edw. I. st. 3) provided a form of recognisance termed a *statute merchant*, to be entered into by a debtor before the mayor or chief warden of a city, town, or borough, and in default of payment a speedy remedy against person, land and goods was expressly provided.

The *Statute Staple* was a similar form of recognisance provided by the 27 Edw. III. st. 2, c. 9, to be entered into before the mayor or

(*k*) 27 Edw. III. st. 2, cc. 5, 19, 21.

(*l*) Y. B., 13 Edw. IV. p. 9.

(*m*) *Oaste v. Taylor* (1612), Cro. Jac. 306.

(*n*) *Bromwich v. Lloyd* (1699), 2 Lutyens, 1582.

(*o*) Cf. Select Cases in the Admiralty, II., xliii, xliv, lix.

(*p*) 4 Co. Inst. 237.

constables of the staple towns (*g*). In addition to the staple towns which enjoyed the exclusive privileges of trade mentioned above, in all towns the merchants in early times formed themselves into *guilds merchant*, and no person who was not a member of the guild was allowed to trade within the town. The essential legal feature of such a guild was the rule of mutual arbitration before recourse to litigation elsewhere, a right recorded in York from 1200 to 1581. These guild merchants split up eventually into particular craft guilds, mysteries, and trading companies, the members of which also enjoyed exclusive privileges of trading in their several arts or industries. These exclusive privileges were finally abolished by the Municipal Corporations Act, 1835 (*r*), which provided that any person, whether he enjoyed the freedom of the borough or of certain guilds, mysteries, and trading companies or not, should in future be free to use any trade, wholesale or retail, or to keep a shop in any city or town. The Courts administering the law merchant gradually fell into desuetude, and by the time of Lord Mansfield, who is said to be the founder of the commercial common law of England (*s*), it had become incorporated with the ordinary common law of the land. Lord Mansfield aided progress by using in trials of cases merchants, and holding that, once a custom had been proved in a considered judgment, it should be judicially noticed in future. Such customs need not be of immemorial antiquity. The negotiability of debentures is a good example of recent usage, given recognition, but of course the new custom must not contradict received law.

**The Courts of the Staple.**—These Courts were established in staple towns in the reign of Edward III. (*t*) to hear cases between merchants of the staple before the mayor and two constables of the staple. The staple Courts administered the law merchant, and their jurisdiction excluded that of the Courts of common law save as regards freehold and felony, but they were subject to the Chancellor and council. They have long since fallen into disuse.

**The Courts of Pied Poudre.**—This was a Court of record attached by the operation of the common law to every fair or market in the county to try causes arising in that particular fair or market. The mayor and two coadjutors, or in the case of a franchise the lord's steward, presided, and it derived its name from the dusty feet of the suitors, merchants of passage, who were the judges. Jurisdiction was denied in matters

(*g*) Both these statutes, having long fallen into disuse, were repealed by the Statute Law Revision Act, 1863.

(*r*) 5 & 6 Will. IV. c. 76, s. 14.

(*s*) See *Lickbarrow v. Mason* (1793), 2 T. R. 63, at p. 73. The law merchant is "the usages of merchants and traders, ratified by the decisions of Courts of law, which, upon such usages being proved before them, have adopted them as settled law": *Goodwin v. Roberts* (1875), L. R. 10 Ex. 337, 346; *Edelstein v. Schuler & Co.*, [1902] 2 K. B. 144, 154. Cf. *Edie v. East India Co.*, 1 W. Bl. 295. For the similar relation of maritime law and common law, see *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115, 119, 123; *The Gaetano* (1882), L. R. 7 P. D. 137, 143. In *Luke v. Lyde* (1759), 2 Burr. 882, Lord Mansfield cited the Rhodian sea law, the laws of Oléron and Wisby, the *Consolato del Mare*, the Ordinances of Louis XIV., English and foreign writers, and laid down the modern law as to freight payable in case of loss of goods at sea.

(*t*) 27 Edw. III. st. 2, c. 21.

of land and the pleas of the Crown. In 1477 jurisdiction was reduced to matters occurring in the limits and time of the fair, and this limitation and economic causes doomed the Court.

It has long since fallen into disuse, though the Bristol Tolzey and Pied Poudre Court still survives, with a wide civil jurisdiction.

**The Court of Policies of Assurance.**—This Court was established in the reign of Elizabeth (*u*) for determining all causes connected with policies of assurance in London; it consisted of the recorder, two civilians, two common lawyers, and eight merchants, a significant combination. It was held in 1658 that proceedings before it did not bar an action at law, and it was abolished by statute in 1863 (*x*).

**The Court of Marshalsea.**—This Court of the Steward and Marshal, of early origin, with jurisdiction restricted to the verge, twelve miles round the place of the King's presence, tried cases of trespass where one of the parties was a member of the royal household, and cases of contract where both parties were members. It was abolished by the 12 & 13 Vict. c. 101.

**The Palace Court.**—This Court, held by the Steward and Marshal, sat at Westminster and heard causes arising within twelve miles of Whitehall Palace. It was created by James I. in view of the feebleness of the Marshalsea Court. It also was abolished by the 12 & 13 Vict. c. 101.

**The Court of the Constable and Earl Marshal.**—It was customary in early times for the King, with the advice of the Constable and Earl Marshal, to issue rules to be observed for the due ordinance and discipline of soldiers in time of war, and these rules and orders were enforced by the Court of the Constable and Earl Marshal (*y*). Martial law of this type, originally exercised in the English invasions of France, was freely used by both sides in the Wars of the Roses. When under Henry VIII. the constable ceased to be appointed regularly, the criminal side of this jurisdiction of the Crown was exercised by persons specially appointed, as in 1536 and 1564, and was unduly extended, so that one of the grievances recited in the Petition of Right (*z*) was that commissions of martial law were issued in time of peace and to try civilians as well as soldiers.

These commissions of martial law were finally declared illegal by the Bill of Rights, 1689, and courts martial to try military and air force offences, which have taken the place of the old Court of the Constable and Earl Marshal, are now held under the authority of the Army and

(*u*) 43 Eliz. c. 12.

(*x*) 26 & 27 Vict. c. 125.

(*y*) Hale's Hist. Com. Law, pp. 34 ff.; Holdsworth, i, 573. The jurisdiction of the Court was attacked under Richard II. and regulated by statute; the 13 Ric. II. c. 2, enacted as follows: "To the constable it pertaineth to have cognizance of contracts touching deeds of arms and of war out of the realm and also of things that touch war within the realm and which cannot be determined nor discussed by the common law, with other usages and customs to the same matters pertaining," *e.g.*, prisoners' ransoms and booty. We find a case of appeal in treason, *Lialton v. Norris* (1453), Nicolas, Privy Council, vi, 129.

(*z*) 3 Car. I. c. 1.

Air Force (Annual) Acts. The Court of the Constable and Earl Marshal, in addition to military offences, took cognisance of contracts relating to military matters, prisoners of war, prize, and the like. Under Richard II. the Court was used to bring for the Crown appeals for *lèse majesté*, the accused being compelled to defend themselves by duel. It also sat as a Court of honour to settle disputes on heraldic matters and precedence and slanders on men of noble blood; the last case to be tried in the Court was that of Sir H. Blount in 1737 (a).

The Court survives in the College of Arms or Heralds' College under the Earl Marshal, which, however, has no coercive jurisdiction, unlike the Lyon Court in Scotland. The vexatious activities of the latter will presumably involve in due course the revocation of its authority, which involves the Court of Session as appellate in needless exercise of jurisdiction in a matter of no public interest (b).

The Lord High Constable's office is now filled for coronation ceremonial, as in 1911 and 1937. Formerly an appointment was made when a trial by judicial combat was required.

(a) (1737), 1 Atk. 296. The illegality of the Court was declared in *Chambers v. Jennings* (1702), 7 Mod. 125, there being no constable.

(b) The uselessness of the office was stressed in the House of Commons, April 7, 1937, when the statutory limit on salary was repealed. Cf. *Maclean v. Maclean*, *The Times*, May 26, 1939.

## CHAPTER VI.

## LEGAL PROCEDURE AND THE LEGAL PROFESSION.

*Procedure in Civil Actions.*

**Forms of Action in General.**—As in the early times of Roman law set forms of actions were invented, and it became a rule that each injury could only be redressed by its own particular remedy, any flaw in that particular form vitiating the whole proceedings, so in English law from the earliest times there were fixed forms of complaint, each form appropriate to the particular injury to be redressed. We have (a) seen how difficult it was for a suitor to obtain redress for some injury for which there was no precedent for a writ, and how eventually the clerks in Chancery were in such cases authorised in 1285 to issue writs *in consimili casu*. But the validity of writs was always controlled by the Courts of common law, and finally the Chancellor took cognisance of those grievances which could not be fitted exactly into the hard and definite forms of the common law writs. His activities, however, developed not the common law proper, but that applied in Chancery, in Admiralty, and in the Star Chamber.

Writs were distinguished as early as Glanville as original, starting a process, and judicial, issued during the course of proceedings for collateral purposes, such as distraining upon a defendant to compel attendance. Writs came to be connected, so that a special form of mesne process, as it was called, followed on a specific original writ.

According to the ancient division, as gradually evolved, actions were either (a) Personal, (b) Real, or (c) Mixed.

(a) *Personal actions* were considered as being founded on contracts or torts. But the distinction only slowly developed, and both contract and tort can be traced to a similar origin. The evolution of tort seems to have rested on development from the criminal aspect, and the writ of trespass was an early manifestation. Finally, torts denoted all wrongs independent of contract, and were of three kinds: (1) Malfeasances, or the commission of unlawful acts. (2) Misfeasances, which meant the improper performance of a lawful act. (3) Nonfeasances, or the omission of an act which a man was legally bound to perform.

The forms of personal actions founded on contract (*ex contractu*) were: (1) Debt, where a certain sum of money alleged to be due from the defendant to the plaintiff was sought to be recovered. (2) Covenant, where damages for breach of an agreement by deed were sought. (3) Assumpsit, for damages for breach of an agreement *not* made by

(a) See p. 242, *ante*.

deed (b). Those founded on tort (*ex delicto*): (1) Detinue, to recover a personal chattel unlawfully detained, a form of action on one view essentially a form of contract (c). But this view is far from certain. (2) Trespass, where damages for an injury accompanied with actual force (*vi et armis*) were claimed, such as a wrongful entry upon another's lands, or a wrongful taking of another's personal goods. (3) Trespass on the case, being a form of action which came into use in the reign of Edward III., and invented under the authority of the statute *in consimili casu* (d) on the analogy of the older writ of trespass; from which it is clearly distinguished in 1390. It lay where damages were claimed for an injury to property or person not coming within the other forms, as where there was a culpable omission of some act, or where the act was injurious only by consequence or collaterally. Also where the idea of force was not applicable, the subject-matter being incorporeal and intangible. Thus there developed malicious prosecution, evolved from the statutory writ of conspiracy, and the action of nuisance, framed on the analogy of the old Assize of Nuisance, a real action. By the sixteenth century libel, slander, negligence and deceit have evolved from case as well as assumpsit. (4) Trover develops from case, on a fictitious loss of chattels, a casual finding, and a conversion; in the seventeenth century it replaces detinue. (5) Replevin, which lay for the recovery of goods alleged to have been wrongfully distrained.

By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), these forms in personal actions were abolished, and the ordinary writ with the endorsement suitable to the particular case was substituted. Since 1875 the procedure in civil actions is governed by the Judicature Acts and the rules and orders made thereunder.

(b) *Real actions* and (c) *Mixed actions*. These may be considered together. All actions involving the right to real property were formerly conducted (as in the case of personal actions) in certain set forms, such as the *Writ of Right Close*, *Writ of Right quia dominus remisit curiam*, *Writ of Assize of Novel Disseisin*, *Writ of Right Juris Utrum*, and many others, some of which have been noticed above. But these remedies were found tedious, and through the great nicety required in their management, and the consequent danger of choosing the wrong procedure, they fell into disuse. The action in ejectment (*de ejectione firmæ*) therefore took their place. Prior to the Common Law Procedure Act, 1852, the action of ejectment was often considered as a mixed action, although in its form it was a species of the personal action for trespass.

(b) This action is connected with trespass on the case from which it is distinct about 1500; the doctrine of consideration and the binding character of an executory contract were established in the sixteenth century: cf. *Slade's Case* (1596), 4 Co. Rep. 92 b. This action rendered it needless to proceed in debt, which allowed wager of law.

(c) J. B. Ames, *Select Essays in Anglo-American Legal Hist.*, iii, 259—319, 417—435; contrast Barbour, *Early History of Contract in Equity*, p. 29. By 1510 detinue was applied to cases where there was no bailment (*sur trover*); it was subject to wager of law, which resulted in trover being preferred, which was allowed in 1674.

(d) Statute Westminster the Second (13 Edw. I. st. 1, c. 24). The origin of trespass may be a modification of the criminal appeal of robbery; Holdsworth, *H. E. L.*, iii, 320 ff., but all is uncertain. Plucknett, *Columbia L. R.*, xxxi, 778, denies connection with the Act of Edward I.

**The Action of Ejectment.**—This action, as a writ of trespass, originally sounded in damages only, and until the latter part of the fifteenth century it was the only remedy open to the lessee for years against a mere stranger. In 1499 judgment was given for recovery, not of damages only, but of a house. In the seventeenth century the action (e) became the favourite remedy of the freeholder for recovery of land. The procedure began with the plaintiff's entry for a moment on the land when he granted a lease to a person who had agreed to serve as nominal plaintiff. The latter made entry, thus taking an estate for years; he was then ousted by the defendant or a fictitious defendant, the "casual ejector," and so could bring an action of ejectment, whose result virtually decided the issue of title, for the Court secured that the actual tenant in possession must be given the chance to defend, while compelling him, from 1656, at any rate, as a matter of course, to "confess lease, entry, and ouster." This procedure explains the formal title of such actions, "*Doe on the demise of X* (the real plaintiff) v. *Roe* (the casual ejector)," though in the reports the name of the real defendant is often given instead of *Roe* (f).

This form of action was in universal use for nearly two centuries, and, when real and mixed actions were formally abolished in 1833 (g), the writ of ejectment was among those exempted. Now by the effect of the Common Law Procedure Act, 1852, and of the Judicature Acts, an action for the recovery of land is commenced with the ordinary writ of summons endorsed with a claim for the recovery of the land in question; the usual pleadings, statement of claim, defence, and reply follow as in the ordinary course of an action.

**Fines and Recoveries.**—These were a species of fictitious or *collusive* action, which had the effect of conveyances by matter of record; originally they were actions commenced in the Court of Common Pleas at Westminster for the recovery of land, but eventually they were adopted as a means of conveying estates where the ordinary conveyances could not be brought into play, and more particularly in the case of entailed estates. In such cases they were merely collusive actions.

**Fines.**—These are recorded from 1179, and were personal actions of collusive character. The alienee was plaintiff, the alienor compromised, and the Court permitted the compromise, the terms being embodied in the judgment. Hence the name from *finalis concordia*. The term Feet of Fines for the records may be literal, being the foot of the record which contained the whole transaction, of which three copies were made, one for either party, and one preserved in the Court records. To prevent fraud, open proclamation in Court was enjoined (h). In 1540 (i) this mode became available to bar an entail,

(e) In the sixteenth century the favourite remedy for recovery of land was the Statutes of Forcible Entry, especially 8 Hen. VI. c. 9, s. 3 (2).

(f) Sedgwick and Wait, *Select Essays*, iii, 611—645.

(g) 3 & 4 Will. IV. c. 27, s. 36.

(h) 4 Hen. VII. c. 24; 32 Hen. VIII. c. 36. The early form is given in *Modus levandi Fines* (18 Edw. I. 1290).

(i) 32 Hen. VIII. c. 36. A widow was not allowed by fine to convert her dower estate into fee simple, nor was a recovery available.

having the advantage over a common recovery of being available to a tenant in tail in remainder, for it was a personal action, not necessitating the action of the person seised of the land. But it barred only the estates tail, not estates in remainder. Fines were very popular and complicated family settlements are found early on the records.

**Recoveries.**—These were also collusive actions operative by 1400, in which the plaintiff (the *recoveror*) recovered the land in question from the defendant (the *recoveree*) in an action carried through all its stages. A fictitious person (called the common vouchee), generally the crier of the Court, was brought into the action, who was supposed to have warranted the title to the defendant. But on his making default, by understood arrangement, in showing his title, judgment went to the plaintiff, the defendant being left to get land of an equal value from the common vouchee under the warranty, which, of course, he never did, the whole action resulting as an absolute conveyance from the defendant to the plaintiff (*k*).

The principal use of recoveries was to convey entailed estates, for it was decided in *Taltarum's Case* (*l*) that a common recovery suffered by a tenant in tail should convert the estate into a fee simple absolute, barring not only those claiming under the entail, but those in reversion and remainder also.

These methods of conveyancing being found intricate and costly, an Act was passed in 1833 (*m*) for the abolition of fines and recoveries, and in their place a simple deed enrolled in Chancery within six months of execution was substituted; enrolment is no longer necessary under the Law of Property Act, 1925 (s. 133). In the case of married women an acknowledgment was required, but this requirement finally disappeared under the Act of 1925 (s. 167).

**The Civil Jury.**—*Origin.*—A very distant analogy of trial by jury no doubt existed in Anglo-Saxon times, but the "jurors" in the shire or hundred were the suitors of the Court, and their action was primarily to lay down the penalties of the alleged offence and the nature and onus of proof. Nor is there any very close parallel to the criminal jury in the occasional use in the later Anglo-Saxon period of twelve thegus to present offenders as ordered by Ethelred II. The modern jury had a closer analogy in the system of inquest introduced by the Normans, following the practice of the Carolingian Kings, which Henry II. used in the *grand* and *petty assizes* referred to above. The grand assize was composed of twelve knights of the neighbourhood, who were themselves chosen by four knights appointed sometimes by the parties for the purpose in the presence of the justices. Apparently the whole sixteen acted; if some or all were ignorant, others were added until twelve agreed. The petty assize was composed of twelve freeholders chosen by the sheriff.

(*k*) See Jenks, *Short Hist. Eng. Law*, pp. 90, 113—115.

(*l*) (1472) *Year Book*, 12 Edw. IV. fol. 19, pl. 25; Digby, *Real Property*, pp. 255—258.

(*m*) 3 & 4 Will. IV. c. 74.

In an action for the recovery of land the defendant might choose battle, which was fought out by *champions*, and not as in criminal cases by the parties themselves (*n*), or he might *put himself upon the country*, that is to say, he might have the matter tried by the new assizes. The writ of trespass, which appears by 1254 and could be used for assault and similar wrongs inflicted *vi et armis* in breach of the King's peace, was speedily made a subject of the inquest by jury (*o*). The jurors combined the functions of the modern jury and of witnesses, and spoke from their own knowledge of the facts (*de proprio visu et auditu*). In a small society this was perhaps possible; but as the community grew it would become difficult to find twelve men who knew the facts, and it became the jury's duty to make inquiries from those who did know, for this purpose it was allowed a fortnight. From an early date, beside compurgation and ordeal, proof might be required to be by charters, and from the first documents and charters were shown to the jury. Similarly under Anglo-Saxon procedure in certain cases witnesses could be adduced, as means of proof of facts, such as official witnesses under Edgar's Ordinances for sale of chattels. By the thirteenth century witnesses to a deed might be summoned as part of the jury; under Edward III. witnesses, sworn to tell the truth, might be adjoined to the jury to give testimony; and under Henry IV., with the permission of the presiding judges, the jurors could listen to persons produced in Court by litigants. In 1481 Brian, C.J., is found submitting only relevant evidence to the jury, but in 1499 the fact that the jury separated and spoke to a friend of the party was held immaterial. In 1562—63, by 5 Eliz. c. 9, attendance of witnesses could be forced, showing the changed position of the jury.

*Development of the Jury.*—The change in the character of the jury from witnesses to deciders on evidence is apparently connected with the assize procedure. The recognitors of the assize were naturally chosen in expectation of their knowledge of the issue, but exceptions might be taken "out of the assize" to any point in it, and those exceptions, if not decided by battle, would be determined, by order of the Court or agreement or the King's command, by a *jurata*, sworn *ad hoc*. Often the assize recognitors being present were used (*assisa vertitur in juratam*), but in any case, as the issue was new, the jury had to decide from what it could ascertain or believe as opposed to knowledge of their own. Unanimity of twelve members seems required from 1350. Still the jurors were bound to be of the *vicinage*, and up to the reign of Elizabeth it was a cause of challenge to a juror that he was not a *hundredor*. Some hundredors were required to be present up to the reign of Anne, when it was enacted (*p*) that the

(*n*) See Blackstone, Comm., iii, 338 ff.; for late procedure, see *Lowe v. Paramour* (1571), Dyer, 301; *Claxton v. Lilburn* (1638), Cro. Car. 522.

(*o*) Edward I. treats it as normal; Statutum Wallie, c. 11. The general use of a jury in case of lands and tenements, goods and chattels, as well as life and death, is attested by 15 Hen. VI. c. 5.

(*p*) 4 & 5 Anne, c. 16; 24 Geo. II. c. 18 (to be chosen from whole county). Under Anne it was laid down that a jury which relied on its knowledge should be sworn as witnesses. Cf. *Bennet v. Hundred of Hartford* (1650), Style, 233. As late as 1670

absence of hundredors should not be a cause of challenge to the jury. The jury were now summoned independently of any knowledge of the case they might be supposed to possess, and the practice of summoning witnesses who had that knowledge and could expound it to the jury became firmly established through actual necessity; it may easily have been encouraged by the adoption of written pleadings which defined the issue to be decided. Thus the jury, who had originally acted both as witnesses and judges, eventually acted in the latter capacity alone, and in 1650 it was already held that if a juror desired to inform the others of what he knew he should be sworn as a witness. Moreover, as will be seen below, the change in character of the jury led to the obsolescence and final abolition of the process by which a jury's verdict might be attained before another jury and the jurors punished. In the year 1851 (14 & 15 Vict. c. 99) the parties to a civil action became competent witnesses.

*Rules as to Juries.*—By the Aliens Restriction (Amendment) Act, 1919 (9 & 10 Geo. V. c. 92), s. 8, no alien shall sit upon a jury in any judicial or other proceedings if challenged by any party to such proceedings. The old rule borrowed from the law merchant allowing an alien a jury *de medietate lingue* died out in the sixteenth century. An alien's right to be a juror only accrues after ten years' domicile under the Juries Act, 1870 (s. 8).

Women, other than vowed members of religious communities, are now liable to serve on juries, whether civil or criminal, and a jury may be composed of women only, but they may be exempted from service by reason of the nature of the evidence or of the issue to be tried (g).

By the Juries Act, 1922, it is in effect provided that the Parliamentary register shall serve as the basis of the jury list, so that a separate register and jury list are no longer prepared. The powers and duties of overseers as to juries were transferred under the Rating and Valuation Act, 1925, to the rating authorities by the Overseers Order, 1927, and the mode of marking lists, &c. is regulated by the Juries Order, 1927. Jurors are either special, with a higher property qualification, or common jurors, between age twenty-one and sixty, qualified by ownership of property (£10 a year real estate or rentcharge, £20 leaseholds), or payment of rates on specified values (£20 usually, £30 in London and Middlesex). Peers, Members of Parliament, clergymen, doctors, lawyers, members of the defence forces, postal, customs and inland revenue servants, among others, are exempt, and a judge or sheriff can excuse attendance in any particular case. Payment of jurors is confined to civil causes, a guinea a cause for special juries, 1s. for others; but coroner's juries may be paid if the local authority so provides.

Juries are not used in the Chancery Division. In pure common law actions the parties used to have the right to demand a jury, but

in *Bushell's Case*, Vaughan, C.J. (Rep. at p. 152), said that the jurors might have known themselves that their verdict was right.

(g) 9 & 10 Geo. V. c. 71; R. S. C., Ord. XXXVI. r. 9A; Women Jurors (Criminal Cases) Rules, 1920; 12 & 13 Geo. V. c. 11, s. 8 (2) (b).

by legislation of 1933 (*r*) the right is restricted drastically. It is to be granted normally on application in cases of libel, slander, malicious prosecution, false imprisonment, seduction, and breach of promise of marriage, and in other actions, including running down cases, if a charge of fraud is made against a party and he claims a jury. Even in these cases the judge may refuse if the trial requires any prolonged examination of documents or accounts, or any scientific or local investigation which cannot conveniently be made with a jury. In all other cases there is unrestricted discretion, and different questions of fact may be decided differently. This restriction has by no means obtained unqualified approval.

### *Criminal Procedure.*

**The Criminal Appeal.**—Trial by battle, as we have seen, was introduced by the Normans, and this was incidental to the mode of criminal accusation known as *appeal* (*s*). The procedure of an appellor was to make his charge in the County Court; if the appellee did not appear, he was outlawed; if he did, the cause was removed by writ to the King's Court, where the judges allowed battle, unless the appellee was found redhanded, or the appellant was maimed, an infant, over sixty, or a woman. The Statute of Gloucester (*t*) allowed a year and a day for the appeal, and in that period royal prosecution was suspended, so that crime often went unpunished; in 1487 (*u*) this rule was abolished in cases of homicide. In 1529 (*x*) the grant to the owner of stolen property of a writ of restitution of that property where he gave evidence to convict the thief took away the benefit of the procedure to the prosecutor; hitherto on conviction by a jury the criminal's property had gone to the Crown absolutely. Appeal still remained competent even after jury trial, and might be resorted to by relatives who resented a verdict, until its revival in respect of the case of *Ashford v. Thornton* (*y*) led to its abolition in 1819.

**The Grand Jury.**—The rise of the jury of presentment in 1166 and 1176 has been mentioned (*z*). It is the forerunner of the grand jury; after the cessation of the Eyres, the sheriff was directed to summon twenty-four persons from the body of the county, as opposed to the earlier twelve from each hundred. This change may explain the development by which the grand jury ceased to make a presentment

(*r*) 23 & 24 Geo. V. c. 36, s. 6. A defendant added in course of a slander action is entitled to claim a jury: *Salvalene Lubricants, Ltd. v. Darby* (1938), 1 All E. R. 224 (C. A.). The issue of the value of expectation of life is at present seriously taxing juries: *Bailey v. Howard* (1938), 55 T. L. R. 249. Judges could not decide better, and their decisions would be more unpopular.

(*s*) For the different forms of appeal, see *Select Essays in Anglo-American Legal Hist.*, iii, 418—422. These were: (1) compensatory in respect of battery, mayhem and imprisonment, the appellor seeking damages; (2) punitive in respect of homicide, rape, arson, larceny or robbery of chattels worth 12*d.* or more, where recovery was impossible; (3) recuperatory, to recover such chattels where punishment also was sought. Those for murder had longest life.

(*t*) 6 Edw. I. c. 9.

(*u*) 3 Hen. VII. c. 1.

(*x*) 21 Hen. VIII. c. 11.

(*y*) (1818), 1 B. & Ald. 405, 457; 59 Geo. III. c. 46.

(*z*) See p. 240, *ante*. For ecclesiastical purposes, the Const. Clarendon, 1164, s. 6, made analogous provision.

based on their knowledge and in lieu heard the evidence for the prosecution and admitted or rejected the proposed case, finding a *true bill*, or *ignoring* it. This function naturally enough allowed ample room for action in other than a judicial spirit, as when in 1681 the grand jury, controlled by the critics of the Court, criticised the action of the Crown by ignoring the bill for high treason against Shaftesbury (a); when the King secured power over the City of London by *quo warranto* proceedings, the charter was allowed to stand only on acceptance of royal approval of the sheriffs, which meant that they would be certain to select jurors unfavourable to the opposition.

The grand jury, as followed from its origin, could take cognisance of charges adduced by private persons without prior investigation by justices or other magistrates as well as charges so investigated. They were therefore regarded as useful in the way of preventing ill-founded accusations going further. But they were criticised as causing needless delay, expense, and duplication of proceedings. The war of 1914—18 strengthened the position of critics, and it was provided that a grand jury might be dispensed with at quarter sessions if all the persons committed had pleaded guilty (b). In 1933 their use at both assizes and quarter sessions was terminated, with a saving only for a few offences, in the main committed overseas (c). An indictment, therefore, can only be preferred before a petty jury if the accused has been committed for trial in due form, or at the direction or with the consent of a judge of the High Court, or pursuant to an order of a judicial officer under the Perjury Act, 1911 (s. 9) (d).

**Informations.**—In lieu of procedure through inducing a grand jury to indict we find from Edward I. onwards the Crown using informations by its officers to secure the putting of persons on trial for treason, felony, or misdemeanours, thus creating a mode for state initiation of criminal proceedings. The Star Chamber similarly dealt with official accusations, and allowed private persons to put in informations, and the process received statutory extension. The restriction to offences less than felony has been ascribed to the fact that the Council and Star Chamber, whose use of informations was general, were precluded from jurisdiction over felonies. Misuse of the right of information by private persons led in 1692 (4 Will. & M. c. 18) to the requirement of the leave of the King's Bench for bringing of informations by the Master of the Crown Office, but all informations other than those *ex officio* by the Attorney-General were abolished by the Administration of Justice (Miscellaneous Provisions) Act, 1938 (1 & 2 Geo. VI. c. 63), s. 12.

**The Petty Jury.**—The petty jury may have been suggested by the procedure by exception already noted in civil cases. An appellee

(a) Hallam, *Const. Hist.*, ii, 449 ff. Cf. Tanner, *Eng. Const. Conflicts*, 1603—89, pp. 246—249, 286—289.

(b) 15 & 16 Geo. V. c. 86, s. 19.

(c) Treason, oppression by governors, breaches of Official Secrets Act.

(d) 23 & 24 Geo. V. c. 36, ss. 1, 2. For committal, see pp. 292, 296, *ante*. The Court of Criminal Appeal does not inquire into the exercise of a judge's discretion in allowing presentment of a bill of indictment: *R. v. Rothfield* (1937), 26 Cr. App. R. 103.

could normally avoid battle by pleading irregularities in the appellor's action or his malice (*de odio et atia*); by Magna Carta (e) this writ was to issue gratuitously and would be decided by inquest. At any rate, after ordeal disappeared in 1219, the greatest pressure was put on the accused to place himself on the country (f). It is not clear how far the jury of presentment was used as the petty jury; possibly the same jury originally acted, procedure varied, but by 1352 it was ruled that the jurors of presentment should not serve on the trial jury (g).

At first the petty jury, like the grand jury, spoke from their personal knowledge of the facts, and not from evidence given in Court; later on, witnesses and documents were allowed to supplement the knowledge of the jurors, and the practice of hearing evidence in open Court became established. Even in the time of Fortescue (1460—70) it is not clear that a jury is distinct from witnesses, but the right to challenge thirty-five jurors in case of felony (reduced to twenty in 1531, but not for high treason) is inconsistent with reliance on their knowledge. In the reign of Mary the jury were not summoned on account of their special knowledge of the facts; rather they were supposed to be in ignorance, and it has remained so up to the present day.

The requirement of unanimity which early developed has been maintained despite its artificial character, and it was only in 1866 (h) that the right of a judge to dismiss a jury which could not agree was admitted in *Winsor v. The Queen*. But some relaxation has been made in the strictness of its application to cases where illness supervenes in the course of a trial. Where in a criminal trial a juror dies or becomes incapable, the jury shall, subject to the assent of the parties and so long as members are not reduced below ten, be considered properly constituted and a verdict be given accordingly (i).

The right of challenge is still preserved, and may be to the array, or in practice to the polls, and may be peremptory, without cause, as in treason or felony, or for cause, e.g., alleged bad character. Women may be challenged on peremptory grounds. A woman may also obtain exemption on the score of the nature of the evidence to be given or the issues to be tried, and in certain sexual crimes are readily excused. Moreover, it rests with the judge to decide if the jury shall in any particular case be composed of men only or of women only.

The alien's right to a jury *de medietate linguæ* given under Edward III. (k) was taken away in 1554 in treason trials (l) and abolished in 1870 (m).

(e) C. 36. See McKechnie, *Magna Carta*, pp. 359 ff.

(f) See p. 240, *ante*. In case of treason or misdemeanour refusal to plead meant conviction: Stephen, *H. C. L.*, i, 298.

(g) 25 Edw. III. st. 3, c. 5. Before this we find (1) the jury of presentment used to decide guilt; (2) part of it acting; (3) the jury afforded by representatives of the four neighbouring vills, or otherwise: Wells, *L. Q. R.*, xxvii, 347 ff.

(h) *L. R.* 1 Q. B. 289, 306. Coke denied, but Hale and Blackstone asserted, the right. Juries were often in cases of sedition or treason most unfairly treated to secure condemnations. Even now criminal jurors are unpaid, while in civil causes common jurors receive 1s. a case, special jurors a guinea.

(i) Criminal Justice Act, 1925, s. 15.

(k) 27 Edw. III. st. 2.

(l) 1 & 2 Ph. & Mar. c. 10.

(m) Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 5.

**Criminal Procedure before and after the Revolution.**—*Before the Revolution of 1688.*—(1) The prisoner was kept in more or less secret confinement, and could not prepare his defence. He was examined and his evidence could be used against him. The coroner with his jury had the duty of inquiries on many topics and could examine on oath. The magistrates under the Acts of 1554 and 1555 above referred to exercised inquisitorial powers, taking down the statement of prosecutors and accused, whether they were bailed or committed for trial, and, despite Coke's and Lambarde's dissent, in the seventeenth and eighteenth centuries they took to issuing warrants to apprehend suspected persons (*n*). The depositions they took were read as evidence at the trial, and they by the Act of 1555 could bind over witnesses to appear for the prosecution.

(2) No notice was given him of the evidence to be produced against him, so that he could not prepare to reply to it.

(3) There were no rules of evidence, nor was he confronted necessarily with the witnesses; the confessions of accomplices were accepted as of special value against the accused.

(4) He had no counsel before or at trial, on the absurd grounds that the judge would protect the accused, and that he should only be condemned on evidence against which no counsel could avail. Occasionally counsel from the fifteenth century were allowed to argue points of law.

(5) He was not at first allowed to call witnesses on his own behalf, and later if he did they were not examined on oath (*o*). Sometimes as under an Elizabethan Act of 1589, one accused of embezzling arms from royal arsenals, could adduce witnesses. He himself could not give evidence on oath, though he could be questioned on his statements in his defence and on the magistrate's examination.

*After the Revolution of 1688.*—(1) In 1695 (7 & 8 Will. III. c. 3) persons indicted for high treason or misprision of treason were to have a copy of the indictment five days before trial; they could summon witnesses on oath, and counsel were allowed to defend.

(2) In 1702 (by 1 Anne, st. 2, c. 9) in treason *and felony* the prisoner's witnesses were to be sworn as also those for the Crown.

(3) In 1708 (by 7 Anne, c. 21) the prisoner could have a list of the witnesses and jury ten days before trial.

(4) The use of counsel was gradually allowed at least for examination and cross-examination of witnesses, but it was only by 6 & 7 Will. IV. c. 114, that all prisoners accused of felony could be fully defended by counsel; and a person committed for trial or held to bail might have a copy of the depositions of the witnesses taken against him.

(5) In 1848 (11 & 12 Vict. c. 42) the prisoner at the preliminary proceedings was allowed to make any statement or adduce any witnesses he liked, but was free to do neither, and the magistrate must so inform him. The witnesses against him must be examined in his presence, and could be cross-examined. The proceedings thus

(*n*) See Part IV., Chap. V., *ante*.

(*o*) Tanner, Tudor Const. Doc., pp. 421 ff. See generally Select Essays in Anglo-American Legal Hist., II, 443—530.

became judicial; professional police replaced the magistrates as exercising inquisitorial functions, and the issue of warrants by magistrates thus became free from objection.

(6) Questioning prisoners ceased after the revolution, though they could make statements in their defence. But as these were not on oath they had not the force of evidence. Now, by the Criminal Evidence Act, 1898 (*p*), every person charged with an offence, or the wife or husband of the person charged, is rendered a competent witness in all cases, but only upon the application of the person charged and subject to the provisions of the Act.

(7) Recently substantial provision has been made for the supply at public expense of legal aid to persons accused of crime. The Poor Prisoners' Defence Act, 1930 (20 & 21 Geo. V. c. 32), replaces the Act of 1903, and the Summary Jurisdiction (Appeals) Act, 1933, provides for increased facilities for appeal to quarter sessions and for legal aid for poor appellants in specified conditions.

**Safeguards for Civil and Criminal Justice.**—*The Independence of Juries—Civil Cases.*—Juries were not at first independent, and were liable to be fined and imprisoned for a wrong verdict. There was possibly some reason for this when the jury gave a verdict from their own knowledge, for in the case of a wrong verdict they would then be committing perjury. Where this was suspected in a civil case, the first jury were put upon their trial before a second or grand jury of twenty-four by *writ of attain*, who retried the issue. If their verdict differed from that of the original jury, the latter were imprisoned for a year, forfeited all their goods, and were rendered infamous for ever (*q*). Attain seems to have fallen by 1600 into disuse, but was not finally abolished until 1825 (*r*). It was utterly illogical when juries became judges of evidence, not witnesses. Its place was taken in the seventeenth century by the practice of moving for a new trial. This was at first very rare, but began with proceedings at *nisi prius*, in which it was stated by Lord Holt to be common in 1700, while in 1757 Lord Mansfield accepted it as general in application. Equity had helped, by ordering new trials at law, and common law had to follow.

There have been noted above the restrictions on the right to demand jury trial due to recent legislation. There is, no doubt, some danger in this tendency, and there is a good deal to be said for preserving jury trial in civil issues; its value has been stressed by many experienced judges, and it has one great merit, that of winning popular acceptance for results. It serves also to safeguard the liberty of the subject from false imprisonment and malicious prosecution; officers and others fear the probability of verdicts for really heavy sums.

(*p*) 61 & 62 Vict. c. 36.

(*q*) Sir T. Smith, *De Republica Anglorum* (written 1565), pp. 111, 147 f.; *Bl. Comm.*, iii, 389 ff. The rule applied first from 1202 to the possessory assizes, and was extended by statute generally (1275—1361), but it did not apply to verdicts of guilty or acquittal.

(*r*) 6 Geo. IV. c. 50, s. 60. Less serious penalties were imposed as an alternative by 11 Hen. VII. c. 24; 19 Hen. VII. c. 3; 13 Eliz. c. 25. For new trials, see *Argent v. Darrell* (1700), 1 Salk. 648; *Bright v. Eymon* (1757), 1 Burr. 390.

A further danger exists in the tendency of the Court of Appeal to prefer its judgment to that of a jury, either as to conclusions or damages. The House of Lords has on several recent occasions pointed out that the Court of Appeal, which does not see the witnesses, is not well qualified to revise the views of those who do, whether jury or judge (s).

*Criminal Cases.*—Juries in criminal cases were, however, frequently fined by the Star Chamber for giving a verdict manifestly against the weight of evidence, or contrary to the direction of the judge (t). Thus in 1554, Sir Nicholas Throckmorton having been accused of treason and acquitted by the jury, the latter were brought before the Star Chamber and imprisoned; four of their number were released on acknowledging their offence, but the remainder were fined, some £2,000, others 1,000 marks; but it appears these penalties were subsequently reduced (u).

After the reign of Elizabeth there were not many cases of this kind, but after the Restoration two successive chief justices of King's Bench (Hyde and Keeling) revived the practice, which was declared illegal by a Resolution of the House of Commons in 1667 (x), and was declared illegal by Hale, C.B., and the other judges. Eventually, in 1670, the independence of juries was finally established by *Bushell's Case* (y).

In this case the recorder of London, on the acquittal of Penn and Mead on a charge of unlawful assembly for having preached in the streets of London, fined the jury 40 marks each. One of the jurors, Bushell, was committed for non-payment of the fine. Thereupon he sued out a writ of *habeas corpus*, and on the return to the writ in the Common Pleas, Mr. Justice Vaughan held that the grounds of the commitment were insufficient. His reasons were antiquarian in form: the attain was sufficient to secure a sense of responsibility in juries, and again they might have their own knowledge. Since then the independence of juries has not been questioned. On the other hand, the power of the Crown to pack juries through the sheriff's mode of summoning jurors was freely used by Charles II. against his opponents, as in the case of Algernon Sidney (z), but James II. failed thus to secure condemnation of the seven bishops (a).

The value of jury trial in criminal causes remains in general acceptance, and is in fact essential to preserve public satisfaction with the administration of justice. The creation of a criminal appeal in 1907 has rendered it safer than ever to rely upon it. The most serious of modern failures of justice, that in *A. Beck's Case*, was due to judicial error and Home Office blundering, and judicial error in a wrong direction to the jury was equally the cause of the worst

(s) *Mechanical and General Inventions Co. v. Austin Motor Co.*, [1935] A. C. 346; cf. *Powell v. Streattham Manor Nursing Home*, [1935] A. C. 243. On damages, *Ley v. Hamilton* (1935), 153 L. T. 384.

(t) Earlier, jurors who indicted, but acquitted later, might be fined.

(u) (1554), 1 St. Tr. 869.

(x) Journ. H. of Com., October 16, 1667; cf. *R. v. Wagstaffe* (1665), Hale, P. C., ii, 313.

(y) (1670), 6 St. Tr. 999; Vaughan's Rep. 135.

(z) 9 St. Tr. 932; Hallam, Const. Hist., ii, 458.

(a) (1688), 12 St. Tr. 183.

miscarriage of Scots justice, as decided by the Court of Criminal Appeal then created, with power to reopen the issue (b).

The necessity of judicial independence has been recognised above.

**The Position of the Judiciary.**—The development of the royal justice led to the growth of a professional judiciary as opposed to the suitors of the popular Courts. The tradition of the communal Courts was followed in the feudal Courts, and remains in the judicial work of the House of Lords in the trial of peers. The evolution of the distinct functions of the judges was helped by the example of the ecclesiastical Courts in which sat a single judge. In the seignorial Courts the stewards, in the face of the reluctance of suitors to attend and the grant of the right of attendance by attorney, must have tended to develop into judges. In the King's Court the tendency came to be to have regular judges, and the justices in eyre, as time went on, became more and more actual judges than mere presiding officers of a communal Court. In the thirteenth century the justices were usually clerics, virtually civil servants. At the end of the century recruitment from the bar became normal, and the modern English system was thus in principle established, with judges to decide on issues of law and juries to become judges of facts.

#### *The Legal Profession.*

**Origin.**—In early times there was no trained class of lawyers; in Anglo-Saxon trials those concerned seem to conduct their own cases, and in the reign of Henry III. laymen and clerics seem to have been appointed judges of the King's Court indiscriminately, no particular knowledge or study of the law being essential to the holding of such a post.

In very early days a litigant appears to have been required in criminal as well as civil issues to bring with him into Court friends (*secta*) to testify to the genuineness of his cause of complaint; Magna Carta (c. 38) confirms this (c). With them he might confer before pleading, whence arises the phrase "to bring suit," and it is possible that in these unprofessional friends, who took no remuneration for their services, we can trace the origin of the present solicitors and counsel. But it is more important that under Henry II. we find that the parties in the King's Court with its new procedure can be represented by *responsales*, friend, relative or bailiff, especially in steps of procedure.

By the Statute of Merton, 1236, the right was conceded to suitors, including litigants as well as those bound by tenure to attend, of being represented by attorney at the county, tything, hundred, wapentake, and manorial Courts (d). In 1278 (e) the privilege was granted to defendants in cases where battle could not be the outcome. At this

(b) Criminal Appeal (Scotland) Act, 1926 (16 & 17 Geo. V. c. 15). For *Beck's Case*, see Parl. Pap. Cd. 2315.

(c) Cf. McKechnie, *Magna Carta*, pp. 371 f. In 1343 it was decided that the *secta* need not appear in Court, but the abolition of the formality is only found in 15 & 16 Vict. c. 76, s. 55.

(d) 20 Hen. III. c. 10.

(e) 6 Edw. I. c. 8; by 3 Hen. VIII. c. 1, it was allowed in appeals of homicide if battle was excluded for any reason.

period under Henry III. there seems to have been permitted also a *counter*, or advocate, *narrator*, who could address the Court whilst the attorney, in the thirteenth century (*f*), had become a professional representative, appointed in Court with power to bind his principal in technical procedure, appearance, default, essoins and the like; whether he was allowed to address the Court seems open to doubt.

In the reign of Edward I. a definite class of professional lawyers first appears. The King had a number of trained pleaders styled *serjeants-at-law* (*servientes ad legem*), who on one theory may date back to William I., and there were also about the Courts a number of young men, the apprentices of the serjeants (*apprenticii ad legem*), engaged in the study of the law (*g*). The term *narrator* disappears in favour of serjeant, but it is not clear if all serjeants were *servientes regis* and by being employed by others became known as *servientes* only, or whether the King's serjeants were merely chosen from a professional body already existing. In 1292 the King gave directions to the justices of the Common Bench to set up in each county a certain number of the better attorneys and apprentices (presumably to attorneys) and henceforward this profession may be regarded as definitely organised under the control of the Courts. It is less clear whether the King meant to regulate the *narratores* similarly, but the differentiation of the professions is indicated by the fact that in 1280 the mayor and aldermen of London had passed an ordinance that no *counter* was to practise as an *attorney* (*h*). From this point, then, we may consider the two professions separately.

**Barristers.**—The old informal class of advocates seem thus to have formed themselves into a definite professional body about the reign of Henry III. or of Edward I. The English law had now become systematised by the writings of such men as Glanville and Bracton, and from 1292 onwards we get the Year Books giving the reports of cases and legal decisions, so that it became more and more necessary to have trained advocates as the weight of precedent and the consequent necessity for the knowledge of case law grew. Another factor which tended to promote the growth of a professional class of advocates was the fixing of the Court of Common Pleas and later of King's Bench at Westminster. In the fourteenth century the serjeants are men of great wealth, taxed as barons; the apprentices are no longer merely students but of various ranks as practising barristers, while the judges are chosen from the ranks of serjeants and to serjeants practise in the common pleas is reserved.

Thenceforth the practitioners of English municipal law formed themselves into an aggregate body; as under the archbishops the teachers at Canterbury in the twelfth century and the universities confined their teaching to the civil or Roman law, and as in that alone degrees were conferred by them, it became necessary to establish colleges of their own in which the English common law might be taught and degrees conferred. Possible rivalry with Roman law in London, where

(*f*) Pollock & Maitland, i, 190.

(*g*) *Ib.* i, 194.

(*h*) *Ib.* i, 195. See also H. Cohen, *History of the English Bar* (1929).

it is thought to have been taught in a law school earlier than the founding of the Inns of Court, had been removed by Henry III.'s veto on its being taught in London schools (1234), following a like veto by Honorius III. as regards the schools of Paris (1219). Roman law, of course, was not thus wholly excluded from influencing English law. The Chancellors in their equity jurisdiction were influenced both by canon and civil law, and in mercantile and admiralty jurisdictions civil law was a potent force, as in international law later on.

Accordingly the apprentices and their teachers purchased various houses known as the Inns of Court and of Chancery situated between Westminster and the City of London, in which the sons of gentry, noblemen, and others resided to pursue the study of the common law, and in which degrees were conferred. They established a form of government under benchers, with readers to instruct learners, with outer barristers to take part in the moots which were staged for instruction of students, and inner barristers or students; presumably this organisation grew up under the supervision of the judges. Instruction was not confined to legal subjects, and hence many studied there without becoming active lawyers; solicitors and attorneys were expected to be members of one of them, and it was not until c. 1700 (the date is doubtful, being placed c. 1550, by some authorities) that they were excluded from the Inns of Court and confined to the Inns of Chancery, thus establishing a marked distinction in education and discipline between the two branches of the profession.

The importance of the Inns as centres of education was lessened by the Reformation, for by 25 Hen. VIII. c. 21, it was declared that the people of England were "free from subjection to any man's laws, but only to such as have been devised, made, and ordained within this realm," or to such others as by the sufferance of the Crown "the people of your realm have taken at their free liberty by their own consent to be used amongst them," and consequently the validity of the civil and canon law depended on its adoption by statute or long usage into our own common law, the universities gave up the teaching of the civil and canon law, and took to the English common law. The Inns of Chancery for this and other reasons decayed and disappeared in the nineteenth century; the moneys from the sale of Clifford's Inn and New Inn were devoted to legal education (*i*).

The Inns of Court, however, remained, and still have the exclusive privilege of conferring the rank of "Barrister-at-law." There is, however, the possibility of appeal to the assembled judges, a recognition of the delegated character of their authority. By usage the Inns are controlled by their benchers, a body formed by co-option, and include barristers, and students, a term until c. 1640 applied not merely to students before admission to practice but to members of the ordinary bar, apprentices. Though independent, the Inns are represented on a Council of Legal Education (1852), and the bar as a whole has a General Council of the Bar (1894) charged with the supervision of legal

(i) *Smith v. Kerr*, [1900] 2 Ch. 511; [1902] 1 Ch. 774, decided that the buildings were not private property.

etiquette. But the right to remove from the bar rests with the Inn by which a student is admitted to it. The General Council is also the means for selecting members of the Rule Committee of the Supreme Court.

There are now four Inns of Court, viz., Lincoln's Inn, Gray's Inn, and the Inner and Middle Temples. In order to take his call to the bar, which he must do to enable him to practise as an advocate, a student must now enter his name at one of these four Inns, and in general must have kept commons for twelve terms (there being four terms in each year). In addition, he must have passed the examinations in the various subjects prescribed by the consolidated regulations.

In early times the serjeants (*servientes ad legem*) were the highest rank of barristers; they were appointed from the apprentices (*apprenticii ad legem*) of sixteen years' standing by writ of summons under the Great Seal issued by the King in Council (*k*), and the call to the *coif* (*l*) was marked by various impressive ceremonies. They alone had right of audience in the Common Pleas until this was taken away by 9 & 10 Vict. c. 54, while in 1850 Queen's Counsel began to share inclusion in the Commissions of Assize. Until the Judicature Act of 1873 came into force, judges were always appointed from amongst the serjeants, who ranked socially but not professionally before the King's Counsel, and even the attorney- and solicitor-general, but not rarely the admission as serjeant took place only after selection as judge. The Judicature Act, 1873, provided that any barrister of ten years' standing might be appointed a judge of the High Court of Justice, and any person who before the Act was qualified to be a judge of appeal in Chancery, or any judge of the High Court of not less than one year's standing, might be appointed an ordinary judge of the Court of Appeal; the degree of serjeant-at-law was no longer a necessary qualification in either case (*m*). Since this provision came into force the degree of serjeant and the order of the *coif* have fallen into disuse, and the serjeants sold their inn in Chancery Lane (known as Serjeants' Inn) in 1877, their numbers being then very small. The origin of the attorney- and solicitor-general is to be found in the *attornati regis*, appointed as early as 1279 (*n*), and up to the seventeenth century there were no other King's Counsel recognised than the king's serjeants, who ranked above the ordinary serjeants, the senior being the King's Ancient Serjeant, and the attorney- and solicitor-general (*o*).

In 1604 Sir Francis Bacon was appointed King's Counsel extraordinary, but merely it seems *honoris causâ*; and this example was followed in 1668 by Francis North (afterwards Lord Guildford) who

(*k*) See Pulling, *Order of the Coif*, p. 31.

(*l*) The Coif was the name given to the peculiar headdress worn by the serjeants, consisting of a white covering of lawn or silk surmounted by a black skull cap of silk or velvet. The modern representation of this head-dress is the small black patch surrounded by a white border upon the top of the wig. (See *ib.* pp. 13 ff.)

(*m*) 36 & 37 Vict. c. 66, s. 8. By 14 & 15 Vict. c. 83, s. 1, any barrister of fifteen years' standing might be appointed a lord justice of appeal in Chancery. See now 15 & 16 Geo. V. c. 49, s. 9.

(*n*) Pulling's *Order of the Coif*, p. 184.

(*o*) *Ib.* p. 185. The attorney-general ranked above the king's serjeants, but only in the seventeenth century above the Ancient Serjeant, an office last filled in 1866.

obtained a patent as *king's counsel* without having taken the degree of serjeant (*p*). During the reigns of William, Mary, and Anne no King's Counsel were appointed, and from the end of the eighteenth century onwards they became recognised as a distinct class or order, and have continued to grow to their present numbers and importance.

The admission of women to the Bar of England has now been legalised by the Sex Disqualification Removal Act, 1919.

**Solicitors.**—In the reign of Edward I. attorneys had ceased to be lay friends casually assisting in suits, and had become a professional class accepting payment for representing their client (*q*), and various statutes were passed in that and succeeding reigns permitting attorneys to act instead of the parties themselves in a variety of causes and matters (*r*). Soon their numbers increased very greatly, and, it being found that many of them were ignorant and incompetent men Henry IV. (*s*) enacted that all attorneys should be examined by the justices, and at their discretion their names put on the roll of each Court, which is perhaps the origin of the roll of attorneys. Later on in the reign of James I. it became necessary to limit the number of attorneys, and an Act was passed in 1605 (*t*) "to reform the multitudes and misdemeanours of attorneys and solicitors at law, and to avoid unnecessary suits and charges in law."

Here we notice the occurrence of the term *solicitor*. He appears in the fifteenth century as a kind of business agent in the Chancery, Star Chamber and Court of Requests, where the duties of attorneys were undertaken by the clerical staffs, while the attorneys were confined to the common law Courts (*u*). By the seventeenth century they appear recognised, especially as legal practitioners in equity. But, unlike the attorneys, solicitors were at first subject to no rules as to qualification. In 1729 the 2 Geo. II. c. 23, was passed "for the better regulations of attorneys and solicitors"; under it no one was allowed to practise unless he had been enrolled and taken the oath to act "truly and honestly"; further, he must have been examined by the judges, and have served as a clerk for five years. By this Act attorneys might be sworn as solicitors, and reciprocity was given to solicitors in 1750. At the same time appears the Society of Gentlemen Practicers in the Courts of Law and Equity with a view to govern attorneys and solicitors.

Acts continued to be passed regulating the practice and charges of solicitors and attorneys, and their education and examination, the principal of these being the Solicitors Act, 1843, the Solicitors' Remuneration Act, 1881, the Solicitors Act, 1888, the Solicitors Act,

(*p*) Pulling's Order of the Coif, p. 189.

(*q*) Pollock & Maitland, i. 192.

(*r*) As to attorneys acting in writs of assize, see Statute Westminster I. (1275); as to pleas touching wounds and maims, 6 Edw. I. c. 1; as to attorneys generally, 13 Edw. I. st. 1, c. 10; as to persons unable to travel, 27 Edw. I. st. 2; in novel disseisin, 14 Edw. II. c. 1; persons leaving the realm, 7 Ric. II. c. 14; pauper litigants, 11 Hen. VII. c. 12.

(*s*) 4 Hen. IV. c. 18. A single roll of solicitors was created by the Solicitors Act, 1843.

(*t*) 3 Jac. I. c. 7.

(*u*) See Christian, Hist. Solicitors, pp. 70 ff.

1922, consolidated in the Solicitors Act, 1932, and the rules and orders made thereunder. Qualification is now dependent on service for a term of five years (in some cases four or three) as an articled clerk to a solicitor, and the passing of a preliminary, an intermediate, and a final examination. These examinations are held since 1878 under the management of the Law Society, a body which originated in 1831 to look after the interests of the profession. In 1903 the Society set on foot a much improved system of legal education in lieu of that in force since 1833, and obtained the co-operation of local Law Societies. In 1922 it was provided that normally before taking the final examination an articled clerk must have attended for a year a course of legal education at a law school provided or approved by the Society. The Society has charge of the roll of solicitors, but admission depends entirely on the Master of the Rolls (*x*). Having served the necessary term under articles and passed the prescribed examination, the intending solicitor may then, on payment of the necessary fees, be admitted and enrolled, after which he becomes qualified to practise.

A woman is now entitled to be admitted and enrolled as a solicitor after serving under articles (*y*).

Solicitors are officers of the Court (*z*) and as such are liable to have summary orders made against them.

The right of audience preserved to solicitors by the Bankruptcy Act, 1914, s. 152, is strictly limited to the High Court, and does not include the Court of Appeal (*a*). Otherwise audience in the High Court and Court of Appeal and House of Lords is confined to counsel and litigants (*b*).

By the Solicitors Act, 1919, the power to strike a solicitor off the Rolls is given to the Committee of the Law Society (*c*) subject to an appeal to the High Court. It is freely exercised.

Solicitors have always been able to sue for their fees, a right which barristers had disclaimed as early as 1629—30 (*d*).

(*x*) Solicitors Act, 1843, s. 21; Solicitors Act, 1888, ss. 5, 6; Solicitors Act, 1932, ss. 1—3.

(*y*) 9 & 10 Geo. V. c. 71, s. 2; Solicitors Act, 1932, Sched. 1, s. 2.

(*z*) 15 & 16 Geo. V. c. 49, s. 215; 22 & 23 Geo. V. c. 37, s. 80.

(*a*) *Elderton, In re* (1887), 4 Morr. 36.

(*b*) A company can only appear by counsel: *Frinton and Walton Urban Council v. Walton and District Sand and Mineral Co.* (1938), 54 T.L. R. 369.

(*c*) 9 & 10 Geo. V. c. 56, s. 5. In 1888, a Discipline Committee of the Law Society, appointed by the Master of the Rolls, reported to the Court on charges against solicitors. See now Solicitors Act, 1932, ss. 4—13; p. 226, *ante*.

(*d*) Relations between solicitors and barristers on this head still cause difficulties; cf. the decision that a barrister cannot prove against a deceased solicitor's insolvent estate for fees paid by client: *Sandiford* (No. 2), *In re; Italo-Canadian Corpn., Ltd. v. Sandiford*, [1935] Ch. 681.

## CHAPTER VII.

## THE ECCLESIASTICAL COURTS.

**Separation of the Civil and Ecclesiastical Courts.**—William I. separated the civil and ecclesiastical Courts in accordance with continental usage, while reserving to himself control of appeals. The efforts of Henry II. to secure a remedy for abuses in the treatment of criminous clerks by the ecclesiastical Courts by insisting on the right to punish after clerical conviction (*a*) were renounced in 1172 as the price of reconciliation with the Church after Becket's murder. The separation thereafter remained undisturbed, the ecclesiastical Courts conforming to the Roman or civil law, the temporal Courts to the English law. To this separation is due the subsequent development of the ecclesiastical judicial system.

**The Ecclesiastical System.**—The ecclesiastical system, which developed gradually, was this: The kingdom was divided into two provinces, Canterbury and York, the provinces into dioceses, dioceses into arch-deaconries, and the latter into rural deaneries; besides these, there were *peculiars*, consisting of such parishes in the two provinces as did not come within the jurisdiction of any bishop (or *ordinary*).

The ecclesiastical Courts (*b*) correspond to these divisions:—

(1) *The Provincial Courts of Canterbury and York.*—These are the Court of Arches in Canterbury, and the Court of Chancery in York, presided over formerly by the *officials principal* separately appointed by the archbishops in both provinces. By s. 7 of the Public Worship Regulation Act, 1874, the archbishops may appoint (subject to the Crown's approval), during good behaviour, a member of the Church of England, being a barrister of ten years' standing, or a judge of a superior Court, to be a judge of the provincial Courts of Canterbury and York. This judge is *ex officio* judge of the Court of Arches and styled Dean of Arches, and of the Chancery Court in York. The jurisdiction of the provincial Courts is chiefly on appeal from the lower Courts. A wider original jurisdiction was cut down by the Statute of Citations (23 Hen. VIII. c. 9), but permitted on the bishop's request or if he neglected to act. Moreover, in certain cases original suits may be brought there in matters concerning the fabric, ornaments, or furniture of any church, or in respect of the burial ground, or

(*a*) Stubbs, *Sel. Chart.*, pp. 164, 165; *Constitutions of Clarendon*, 1164, c. 3. Becket unreasonably denounced this as contrary to divine law. Cf. Maitland, *Canon Law*, pp. 132 ff.

(*b*) The ecclesiastical Courts were abolished with the Court of High Commission in 1641 (16 Car. I. c. 11), but revived again after the Restoration (13 Car. II. st. 1, c. 12).

concerning ritual (c). Appeal lies to the king in Council, that is, since 1833, to the judicial committee of the Privy Council (d).

(2) *The Prerogative and other Courts of Canterbury and York*.—When the ecclesiastics obtained jurisdiction over wills and administrations in the twelfth and thirteenth centuries, this jurisdiction was exercised by the ordinary (or bishop) of the diocese. But, if the deceased had *bona notabilia*, that is, goods to the value of 100s., in two provinces, to save the expense of separate probates, the will was proved before a professional judge appointed by the archbishop in the prerogative Court of the province. About the time of the Reformation the Court came in the case of Canterbury to be located in London at Doctors' Commons.

In 1857 the jurisdiction in wills and administration was taken from the ecclesiastical Courts and handed over to the Court of Probate (e), and by the Judicature Act, 1873, to the Probate, Divorce and Admiralty Division of the High Court of Justice.

In addition to the Court of Arches there are in the case of Canterbury the Court of the Commissary, who is a distinct officer from the Dean of Arches, which is the ordinary consistory Court for the archbishop's diocese; the Court of the Vicar-General, before which the confirmation of bishops takes place (f); and the Court of the Master of the Faculties, which attends to matters connected with public notaries, who are still appointed by the Archbishop of Canterbury by *faculty* (g), appeal lying to the Lord Chancellor.

In York the Vicar General of the Province is also Chancellor of the Consistory Court; his office issues marriage licences for the diocese.

In both provinces there were formerly Courts of Audience, where the archbishop himself presided, exercising his residual jurisdiction, but these have fallen into disuse (h).

(3) *The Diocesan or Consistory Court of the Bishop*.—This Court was presided over by the bishop's chancellor, who must be, since 1603, a bachelor of laws or a master of arts, and must now be a barrister of at least seven years' standing. Originally the Court thus constituted had cognisance of appeals from the Archdeacons' Courts, and also of all ecclesiastical causes arising within the diocese. Jurisdiction over offending clerks was taken from the chancellor by the Church Discipline Act, 1840 (3 & 4 Vict. c. 86), and handed over to the bishop sitting with five assessors. It was, however, within the power of the bishop to send any case by letters of request to the Provincial Court, and this was often done. Jurisdiction, accordingly, was restored to the chancellor by the Clergy Discipline Act, 1892 (i) (with regard to offences

(c) Public Worship Regulation Act, 1874, s. 9.

(d) 3 & 4 Will. IV. c. 41.

(e) 20 & 21 Vict. c. 77. For custody of will in principal probate registry, see 15 & 16 Geo. V. c. 49, s. 173.

(f) See *ante*, p. 85.

(g) Phillimore, *Ecc. Law*, p. 945. The Dean of Arches now holds the office. See 41 Geo. III. c. 79; 6 & 7 Vict. c. 90, s. 4. In Wales the power rests with the Clerk of the Crown in Chancery under order March 29, 1923, of the Lord Chancellor, under 4 & 5 Geo. V. c. 91, s. 37; 9 & 10 Geo. V. c. 65, s. 2. Marriage licences are also issued from this Court, available in all England; those issued by the Vicar-General's office are available except in the province of York. Special licences issue from the Faculties Office. The Dean of Arches is also Vicar-General.

(h) As to these various Courts, see Phillimore, *Ecc. Law*, pp. 922 ff.

(i) 55 & 56 Vict. c. 32. Contempt of the Court can be punished by King's Bench: *R. v. Daily Herald (Editor)*; *Norwich (Bishop)*, *Ex parte*, [1932] 2 K. B. 402.

falling within the Act), which provides that complaints on the ground of immorality against the clergy should be held in the consistory Court before the chancellor, and five assessors if either party desire. Appeal may be, at the option of the appellant, to the provincial Court or to the King in Council, but either is final. Questions of ritual and doctrine do not come within the Act. Under both Acts the bishop's discretion to allow proceedings is absolute; he can pronounce sentence by consent without further proceedings, and can inhibit the accused from performing church services pending the investigation. Any parishioner, the bishop, or a person appointed by him, can prosecute.

By the Public Worship Regulation Act, 1874 (*k*), questions concerning the fabric, ornaments, or furniture of any church, or in respect of the burial ground or concerning ritual, may be represented to the bishop by an archdeacon, a churchwarden, or any three parishioners; the bishop may either refuse to institute proceedings or, with the consent of both parties, deal finally with the case; if the parties do not so consent, the case goes to the provincial Court.

(4) *The Peculiar Courts*.—Besides the consistory Courts, there were in various dioceses *peculiar Courts* with jurisdiction over such causes as arose within the peculiar parishes mentioned above. The Dean of the Court of Arches, which took its name from the form of the arches in the steeple of Bow Church in London, where the Court was held, formerly exercised the peculiar jurisdiction of the Archbishop of Canterbury over the parish of Bow and twelve other parishes, which were exempt from the Bishop of London's jurisdiction (*l*). This jurisdiction later came into the hands of the official principal of the provincial Court (*m*), and is now exercised by the Dean of Arches, the judge of the provincial Court in the Court of Peculiars. The jurisdiction of the peculiars has now normally, but by no means universally, passed into the hands of the bishops or archbishop; formerly they were royal, archiepiscopal, episcopal, decanal, sub-decanal, prebendal, rectorial, and vicarial, or even manorial.

(5) *The Archdeacon's Court*.—The functions of this Court were originally to hold inquiries into matters relating principally to church fabrics and furniture. It, however, extended in many dioceses, by permission of the bishop from the twelfth century onwards, its jurisdiction at the expense of the consistory Court. It has now become obsolete.

(6) *The Court of the Rural Dean*.—This Court was held preparatory to the visitation of the archdeacon's Court. But by the Reformation it had become obsolete.

(7) *The Court of High Commission*.—This Court was brought into existence under the prerogative in 1549 in order to secure conformity to the Book of Common Prayer, and gained statutory confirmation

(*k*) 37 & 38 Vict. c. 85. The purpose of the Act according to Disraeli was to put down ritualism, but it has been wholly ineffective: Monypenny & Buckle, ii, 653—671; May, Const. Hist., iii, 221. Cf. *Green v. Lord Penzance* (1881), 6 App. Cas. 657.

(*l*) Phillimore, Eccl. Law, p. 214.

(*m*) *Ib.* p. 924. For the abolition of peculiars, see 1 & 2 Vict. c. 106; 3 & 4 Vict. c. 86; 10 & 11 Vict. c. 98.

by 1 Eliz. c. 1, which gave the Crown power to issue commissions to try all manner of errors, schisms, heresies, abuses, offences, contempts, and enormities (*n*). These commissions developed from 1580 to a Court, whose jurisdiction was held valid under the ecclesiastical prerogative in *Cowdrey's Case* (*o*). Under these very wide powers the Court proceeded in that and the two following reigns to exercise almost despotic powers of fining and imprisoning, but it had no power of inflicting death or torture. It used the Star Chamber device of forcing the accused to answer questions on oath (*ex officio*). Its sentences were arbitrary and severe, and it tried offences both of clergy and laity, especially misconduct and immorality, but also doctrinal and disciplinary matters such as recusancy and nonconformity. On doctrine and discipline, appeals from inferior Courts were taken to it freely. The Court was abolished with the other ecclesiastical Courts in 1641 (*p*). James II., in 1686, endeavoured to revive it in order to further his endeavours to secure the position of Roman Catholics, as the Court of commissioners for ecclesiastical causes with Judge Jeffreys as its president. His subsequent flight put an end to the attempt, which was declared illegal by the Bill of Rights.

(8) *The Court of Delegates and the Privy Council*.—This Court was established by 25 Hen. VIII. c. 19 (1534), which authorised the Crown to issue a commission out of Chancery to hear appeals in ecclesiastical causes. Appeals to this Court took the place of appeals to Rome, and its decisions were final, unless the King ordered rehearing by a Commission of Review. Reasons for its judgments were not given, and it was poorly paid and so not in command of legal talent. Appeals lay to it from all the inferior ecclesiastical Courts until 1832, when a royal commission, which had been formed for the purpose, having reported unfavourably of it, it was abolished by 2 & 3 Will. IV. c. 92, and its powers transferred to the King in Council, and eventually, by 3 & 4 Will. IV. c. 41, to the judicial committee of the Privy Council. The Judicature Act, 1873 (*q*), threatened to destroy the appellate jurisdiction of the Privy Council with that of the House of Lords, but it was restored by the Appellate Jurisdiction Act, 1876, which provided for the appointment of certain of the archbishops and bishops to sit as assessors of the judicial committee to hear ecclesiastical causes (*r*).

(9) *The Special Jurisdictions of the Archbishops*.—Under the Benefices Act, 1898 (*s*), the bishop may refuse institution or admission to a benefice on grounds of infirmity, pecuniary embarrassment,

(*n*) R. S. Usher, *The Rise and Fall of the High Commission* (1913); Tanner, *Tudor Const. Doc.*, pp. 360—374.

(*o*) (1591), 5 Co. Rep. 344, 345. Coke and his colleagues under James I. rules that the Court could not imprison, and denied the validity of the *ex officio* oath, save in causes testamentary or matrimonial where it was justified by long custom: Tanner, *Const. Doc. of James I.*, pp. 146—172. But Coke's dismissal was followed by recognition of its activity.

(*p*) 16 Car. I. c. 11. The ordinary ecclesiastical Courts were revived after the Restoration in 1661 (13 Car. II. st. 1, c. 12). On James II.'s action, cf. Hallam, *Const. Hist.*, iii, 63 f.

(*q*) S. 20.

(*s*) 61 & 62 Vict. c. 48.

(*r*) App. Jur. Act, 1876, s. 14.

ecclesiastical misconduct or moral character. Appeal lies to the Archbishop, sitting with a judge of the Supreme Court nominated by the Lord Chancellor who decides all questions of law and finds facts. Under the Benefices (Ecclesiastical Duties) Measure, 1926 (*t*), a like tribunal hears appeals from decisions of the bishop on the subject of negligent or inadequate performance of duties. The bishop may inquire by commission into allegations of this kind and inhibit on its report (*u*).

**The Jurisdiction of the Ecclesiastical Courts.**—The ecclesiastical Courts enjoyed, and still enjoy, jurisdiction over such purely ecclesiastical matters as ordination, consecration, ecclesiastical status, church fabric (*x*) and ornaments (*y*), and the like. But, in addition, they obtained jurisdiction over such purely temporal matters as wills and administrations, and matrimonial causes and divorce; though they could declare a marriage void *ab initio*, they could not annul a marriage initially valid, and a full divorce could only be obtained by Act of Parliament. They also enjoyed certain criminal jurisdiction, and prior to the Restoration this extended over clerics and laymen alike. Their jurisdiction in wills and administrations was abolished in 1857, and handed over to the Court of Probate (*z*), and in the same year jurisdiction in matrimonial causes was handed over to the Court of Divorce (*a*), which was given the power to grant a full divorce. Both these jurisdictions have, since the Judicature Act of 1873, become vested in the Probate, Divorce and Admiralty Division of the High Court of Justice, appeal lying in ecclesiastical matters to the judicial committee of the Privy Council, and in matrimonial matters and divorce to the Court of Appeal. Tithes have been converted into rentcharges, whose extinguishment is provided for by the Tithe Act, 1936, and rules thereunder; distraint need no longer be carried out under County Court orders under the Tithe Act, 1891 (*b*), and church rates as compulsory were abolished in 1868 (*c*).

**The Criminal Jurisdiction.**—The ecclesiastical Courts, however, retained their criminal jurisdiction:—(1) In cases where a clerk was accused of felony. This right of trying their own clerks was termed *Benefit of Clergy*, and consisted in the right of the clerk in orders, when before the temporal Court on a charge of felony, of being handed

(*t*) 16 & 17 Geo. V. No. 8, ss. 5—7.

(*u*) *Huntley v. Bishop of Norwich*, [1931] P. 210.

(*x*) The Chancel Repairs Act, 1932 (22 Geo. V. c. 20), deprives them of jurisdiction on that subject. Cf. *Wickhambrook Parochial Church Council v. Croxford*, [1935] 2 K. B. 417.

(*y*) Cases as to grant or refusal of faculties on this score are still frequent, e.g., *St. Saviour's, Hampstead, In re*, [1932] P. 134; *St. Pancras Metropolitan Borough Council and Journeymen Tailors' Benevolent Institution, Ex parte* (1937), 53 T. L. R. 456; *St. Hilary, Cornwall, In re* (1938), 54 T. L. R. 975; monument over grave, *Little Gaddesden Churchyard, In re*; *Cuthbertson, Ex parte*, [1933] P. 150, Ct. of Arches.

(*z*) 20 & 21 Vict. c. 77.

(*a*) *Ib.* c. 85.

(*b*) *R. v. Kent County Court Judge*; *Ferridge, Ex parte*, [1932] 2 K. B. 535; 54 & 55 Vict. c. 8; *Pitt-Rivers v. Queen Anne's Bounty Governors*, [1936] 2 K. B. 416. A simple personal action still lies for arrears of an annuity payable in lieu of rent-charge, despite the statutory remedies: *Public Trustee v. Scarr* (1939), 55 T. L. R. 341.

(*c*) 31 & 32 Vict. c. 109.

over to the ecclesiastical Courts, where he could clear himself by compurgation. This right he enjoyed even if he stood his trial and was convicted, as often was the case from the time of Henry VI., for the Courts came to insist on trial before handing over; they even worked so fast as to hang some, but Edward in 1352 (25 Edw. III. st. 6, c. 4) promised not to fail to hand over. This privilege was extended by the time of Edward IV. to all persons who could read, and, by a statute of Anne (d), even this qualification was rendered unnecessary, and all clerics and laymen could claim Benefit of Clergy alike. But a layman claiming the benefit could be branded in the hand, and he could claim it once only (e). Under Henry VI. and later in the greater offences, when guilt was certain, the clerk was handed over *absque purgatione faciendâ*, which meant that he lost land and goods and had to undergo imprisonment for life. Subject, however, to this, clerks who had committed "clergyable" offences got off, even if convicted, with branding, imposed in 1490, for the first offence and the forfeiture of their goods as often as they offended, and the same was the case with the peers (f) and peeresses as regards the first offence. In the case of commoners the right became restricted to the first offence, and released them from capital punishment only.

In the case of the more heinous felonies, Benefit of Clergy was abolished by various statutes, and it was finally abolished altogether in 1827 (7 & 8 Geo. IV. c. 28) in the case of commoners, and by 4 & 5 Vict. c. 22, in the case of peers.

The kindred evil of *sanctuary* was attacked under the Tudors. It took two forms: the criminal could take refuge in church or monastery, confess to the coroner, and abjure the realm; if he returned he would be hanged; he was branded under 21 Hen. VIII. c. 2 to facilitate identification if he returned, but in 1531 (22 Hen. VIII. c. 14) abjuration of the realm ceased, and those who took sanctuary had to remain therein. In other cases he took refuge in a liberty such as that of Westminster, Martin-le-Grand, &c.; in 1540 (32 Hen. VIII. c. 12) sanctuary was denied to persons guilty of murder, rape, burglary, robbery, arson, and sacrilege. In 1623 (21 Jac. I. c. 28) in theory it was abolished, but for a century it lingered on in fact against civil process in such places as Whitefriars, the Savoy, and the Rules of the Fleet.

(2) In matters of a purely spiritual nature. These were principally proceedings *pro salute animæ* of the offender, and this jurisdiction the Church claimed over laymen as well as clerics. Such matters as adultery, incest, perjury, defamation, swearing, profanity, drunkenness, breach of faith, immorality, and heresies came under this head, and the Court of High Commission tried errors, schisms, abuses, offences, contempts, and enormities. The penalties inflicted by the ordinary Courts were mostly by way of penance, and could be com-

(d) 6 Anne, c. 9.

(e) 4 Hen. VII. c. 13. By 18 Eliz. c. 7, imprisonment for a year was authorised as well as burning, but prisoners were then liberated, compurgation having disappeared.

(f) 1 Edw. VI. c. 12, gave privilege to peers, even if they could not read, together with bigamists. Women received it by 21 Jac. I. c. 6 (1624), and 3 Will. & M. c. 9 (1691).

mutated by payment; the Court of High Commission could sentence to fine or imprisonment, but could not inflict death or torture. The proceedings were either by way of inquisition, accusation, or denunciation (*g*), and it was on account of the abhorrence in which they were held that Parliament abolished the ecclesiastical Courts in 1641; but, with the exception of the Court of High Commission, they were re-established in 1661 (*h*).

At the present day many of the offences formerly tried by the ecclesiastical Courts have been made by statute punishable at the common law, *e.g.*, unnatural offences (1533), witchcraft (1541), bigamy (1603), defamation (18 & 19 Vict. c. 41), perjury (*i*), brawling in churches (23 & 24 Vict. c. 32), certain forms of incest (8 Edw. VII. c. 45), and the like; slander where it attributed a common law crime was taken by prohibitions from the ecclesiastical Courts from Edward IV.; though there is no legal reason why other offences should not still be tried in the ecclesiastical Courts. As a matter of strict law (*k*), it appears that a layman guilty of such offences as atheism, blasphemy, heresy, schism, or the like, might still have public penance inflicted upon him by an ecclesiastical Court; on refusal to do penance he might be excommunicated, but the only penalty permissible is imprisonment not exceeding six months as directed by the Court (*l*). He would, however, not be entitled to receive the sacrament, and if he died in contumacy the burial service could not be read for him.

Ecclesiastical jurisdiction over laymen has, however, fallen into disuse, though the ecclesiastical Courts still enforce propriety of conduct in members of the profession (*m*).

The history of *heresy* is worth consideration. The insurrection of 1381 enabled Archbishop Courtenay to secure the irregular passing of a statute for the imprisonment of heretics, but at the demand of the Commons it was repealed in the same year, though in fact it remained on the statute book. The first writ *de hæretico comburendo* was issued by the Crown with the consent of the Lords in 1400 for burning one William Sawtre, who had been convicted by the Council of Canterbury of being a relapsed heretic (*n*). In the same year a statute was passed (*o*) providing that all relapsed heretics should be burnt. In 1414 a severer Act was passed and people burnt frequently. In 1539 the Act of the six articles (31 Hen. VIII. c. 14) punished heresy with burning, imprisonment, or execution. Edward VI. repealed these statutes, but preserved the writ *de hæretico comburendo* as an alleged common law writ, following on conviction by a Provincial Council.

(*g*) Stephen, Hist. Crim. Law, ii, 401.

(*h*) 13 Car. II. st. 1, c. 12.

(*i*) In *Phillimore v. Machon* (1876), 1 P. D. 481, it was held that since 4 Geo. IV. c. 76, ecclesiastical jurisdiction in perjury was inferentially repealed by grant of jurisdiction to secular Courts.

(*k*) 29 Car. II. c. 9, which abolished the writ *de hæretico comburendo*, left intact ecclesiastical authority, as did 13 Car. II., st. 1, c. 12.

(*l*) See 53 Geo. III. c. 127.

(*m*) See Stephen, Hist. Crim. Law, ii, 437.

(*n*) *ib.* ii, 445.

(*o*) 2 Hen. IV. c. 15. This gave authority to the bishops, while 2 Hen. V. st. 1, c. 7, authorised the bishops to obtain aid from the civil power, indictments before quarter sessions being followed by trial by the bishops. The Act of 1401 was repealed by 25 Hen. VIII. c. 14.

Mary again revived the heresy laws, which were again repealed by Elizabeth, except with regard to Anabaptists, who were burnt down to 1612 under the old writ. The ecclesiastical Courts were abolished in 1641, and on their revival in 1661 the old law of heresy had fallen into oblivion. The writ *de hæretico comburendo* was finally abolished by a statute of Charles II. (*p*), ecclesiastical censures only being left.

As against ecclesiastics the most serious *penalties* now inflicted are suspension and deprivation, and in extreme cases deposition by the bishop from holy orders, penalties provided under the Clergy Discipline Act, 1892, on complaints for immorality (*q*). The same Act compels the bishop to declare the preferment empty if a clergyman is convicted of grave crime or is found to have committed adultery or other matrimonial offence; if he does not, the archbishop acts. Under the Public Worship Regulation Act, 1874, on inhibition after monition, after three years, without relaxation, a vacancy is created.

It must be noted that the protection accorded to the performance of divine service is not taken away because the service may be carried out with illegalities (*r*). Presumably this view applies only to such illegalities as do not transform the service into something other than such service. The decision calls attention to the fact, which was energetically discussed in the early years of the century and investigated by a Royal Commission of 1904, whose report was left unacted on, that there is no means of dealing with breaches of ritual unless the bishop of the diocese is prepared to act (*s*), and that, as often he is not prepared to do so, there is much illegality in the Church.

(*p*) 29 Car. II. c. 9.

(*q*) 55 & 56 Vict. c. 32, s. 1. Cf. *Wakeford v. Bishop of Lincoln*, [1921] 1 A. C. 813, as to appeal. Simony is not immorality under s. 2: *Beneficed Clerk v. Lee*, [1897] A. C. 226. See also *Sweet v. Young*, [1902] P. 37. Deposition took place in Mr. Davidson's case in 1933 after the rejection of appeals to the Privy Council.

(*r*) *Matthews v. King and others*, [1934] 1 K. B. 505.

(*s*) Cf. the Bishop of Liverpool's refusal to take action against the Dean of Liverpool Cathedral because of permission given to a Unitarian to deliver an address there: *The Times*, January 6, 1934. See Dugdale, Arthur James Balfour, i, 275 ff.; Halévy, *Hist.*, 1905—15, p. 76.

## PART V.

## Foreign Affairs and Defence.

## CHAPTER I.

## THE CROWN IN FOREIGN RELATIONS (a).

**The Prerogative.**—In England, by virtue of the prerogative, the Crown enjoys the right of making war and peace; of declaring neutrality; of recognising or refusing to recognise foreign States or governments; of conducting relations with foreign countries; of appointing diplomatic agents and consuls who form the medium of intercourse between one State and another; of issuing passports to its subjects seeking free passage and security for their movements out of British territory, or also within the Empire, and of making treaties. It must, however, be understood that in the conduct of such matters the Crown acts upon the advice of its constitutional councillors, namely, the Cabinet or the Prime Minister and the Secretary of State for Foreign Affairs, and normally through its responsible minister, namely, the Secretary of State for Foreign Affairs as the Parliamentary head of the Foreign Office. Thus George V. accepted the advice of Mr. Henderson for the establishment of full diplomatic relations with the Soviet Government, though he had objections on family grounds and the Prime Minister was not wholly certain of the wisdom of the course (b). In all interviews with representatives of foreign powers, it is the practice of the Secretary of State or the Permanent Under Secretary to be present. If the sovereign discusses matters out of England, the presence of a diplomatic agent or minister is proper.

Control of foreign policy by the House of Commons is difficult to make effective, and no government will accept the suggestion of a Parliamentary committee to keep the ministry and Commons in touch.

(a) For the Foreign Office, see p. 174, *ante*. The assertion that foreign relations are a matter of prerogative is questioned by Warrington, L.J., in *Ferdinand, Ex Tsar of Bulgaria, In re*, [1931] 1 Ch. at p. 139, but this is contrary to general usage: *Commercial and Estates Co. of Egypt v. Board of Trade*, [1925] 1 K. B. 271; *Att.-Gen. for Canada v. Att.-Gen. for Ontario*, [1937] A. C. 326; Keith, *Responsible Government in the Dominions* (1928), i, 93, n. 3.

(b) H. I. Laski, *Parl. Govt.*, p. 423. As to whether a matter is sufficiently important or not to be made a Cabinet question rests generally with the Prime Minister. For Mr. Balfour's relations with Lord Lansdowne in 1902—05, see Dugdale, *Arthur James Balfour*, i, 379—391; for Mr. Chamberlain's position in 1898—99, *ib.* i, 249 ff. Mr. Lloyd George's interference with Lord Curzon has been noted, p. 174, *ante*. Mr. R. MacDonald interfered a good deal with Mr. Henderson, and Mr. N. Chamberlain controlled Mr. Eden until his resignation, in February, 1938, and thereafter acted in all vital matters as foreign minister, visiting Germany in September, 1938, without Lord Halifax who was taken to Rome in January, 1939. It appears from the mode of negotiation and signature of the Munich agreement, September 29, 1938 (*Parl. Pap.*, Cmd. 5848), that the Prime Minister, by virtue of his office, can without express delegation bind the Crown in foreign affairs.

Debates, as in 1935—39, are rather negative in effect, for discretion prevents full disclosures, and the opposition lacks the necessary information to develop a coherent policy, as shown in the abortive debate of March 26, 1937, and repeatedly in 1938—39. The Government in these years failed signally to operate the policy announced at the 1935 election, but the Commons acquiesced on the strength of its allusions to war dangers.

In the appointment of high diplomatic functionaries, it is the rule for the Crown to adopt the advice of its Ministers, though this rule was broken through upon at least one occasion, when William IV. refused to sign the appointment of Lord Durham as ambassador at St. Petersburg (c).

**The Position of Foreign Sovereigns.**—It lies with the Crown to recognise foreign sovereigns; thus by agreement of April 16, 1938, on November 16 the King of Italy was recognised as Emperor of Ethiopia and the Emperor ceased to receive recognition, and by this action his property rights, not reduced into possession, passed to the Kingdom of Italy (d). The Crown may recognise one government *de jure* and another *de facto* at the same time in respect of parts of the same territory and each then will enjoy rights in the British Courts, though with one diplomatic relations proper, with the other a reduced form of representation may be arranged (e). The general rule in England is to allow a very wide immunity to States and their heads, from jurisdiction of the Courts. This has been applied to the sovereigns of protected States, including the States of India, and it may be presumed also to their entourage, but hardly to mere temporary servants, though there is no recent authority. Sovereigns can, of course, be plaintiffs in the Courts, and then fall under the same rules as to liability as do diplomatic agents, discussed below. A monarch not recognised as reigning, even if he denies abdication, would not be exempt. The exemption is not from duty to obey the law, but from legal process (f). The exemption of State property from process is absolute as regards any recognised government (g), but it is not finally decided if this exemption should be extended to vessels engaged in purely commercial avocations (h), though there is the authority of the Court of Appeal for it (i). The difficulty is that English law usually accepts only as part of its doctrines of general acceptance by foreign States, and this matter is not one of

(c) The Sovereign may also exercise the right of refusing to receive accredited agents who are distasteful to him: see Hall, *International Law*, p. 354; cf. Wheaton, *Int. Law* (ed. Keith), i, 439.

(d) *Haile Selassie v. Cable and Wireless, Ltd.* (No. 2) (1938), 54 T. L. R. 209.

(e) Spain in 1938: *Banco de Bilbao v. Sancha*, [1938] 2 K. B. 176, 195; *The Arantzazu Mendi* (1938), 55 T. L. R. 71. There was a British agent at Burgos, and an agent from General Franco in London.

(f) *Mighell v. Sultan of Johore*, [1894] 1 Q. B. 149; *Statham v. Statham*, [1912] P. 92. Cf. Dicey and Keith, *Conflict of Laws*, p. 198.

(g) *Duff Development Co. v. Kelantan Government*, [1924] A. C. 797; *The Parlement Belge* (1880), 5 P. D. 197; *The Gagara*, [1919] P. 95; *The Porto Alexandre*, [1920] P. 30; *The Jupiter*, [1924] P. 236; (No. 2), [1925] P. 69; but a statement as to part ownership does not bind a British Court: (No. 3), [1927] P. 250.

(h) *Vascongada (Compania Naviera) v. SS. Cristina*, [1938] A. C. 485, where Lords Maugham, Thankerton and Macmillan leave the issue open.

(i) *The Porto Alexandre*, [1920] P. 30.

universal agreement (*k*). The immunity applies only where the property is in the effective control of a State so that action would be needed to secure possession (*l*).

**Diplomatic Agents.**—It is the general practice amongst nations to conduct their intercourse with foreign States by means of diplomatic agents, duly accredited by the Government of the country which they represent, the establishment of permanent legations being generally dated from the peace of Westphalia in 1648 (*m*).

Diplomatic agents were divided into three classes by the Vienna Congress, 1815, an intermediate and unimportant class being provided for *Ministers Resident* by the congress of Aix-la-Chapelle in 1818 (*n*).

The various classes of diplomatic agents internationally recognised are now, therefore, as follows:—

- (1) Ambassadors, legates, or nuncios.
- (2) Envoys, Ministers, or other persons accredited to Sovereigns.
- (3) Ministers Residents, accredited to the various Courts.
- (4) *Chargés d'Affaires* accredited to Ministers for foreign affairs.

Ambassadors, legates, and nuncios are alone to have the "representative character," and precedence among diplomatic agents in their respective classes is to be according to the date of the official notification of their arrival (*o*). In certain cases by treaty a permanent precedence is accorded, *e.g.*, to the British ambassadors in Iraq and Egypt in view of the special historical relations with these States.

Diplomatic agents are appointed by royal commissions and are accredited by letters of credence, which are signed by the King in the case of the Ministers accredited to foreign Sovereigns, and sealed, and which specify their name, rank, and authority to communicate in the name of their respective Governments; and when special envoys (*p*) are employed to conduct negotiations on specific topics, or for discussing or signing treaties, these are usually appointed by letters patent defining the limits of the powers conferred upon them (*q*). The work done by British diplomats and consuls is regulated by general instructions issued by the Foreign Office under the prerogative, supplemented by special directions in each case of doubt.

Representatives of the members of the League of Nations and officers of that body when on official business are given diplomatic status.

(*k*) See p. 342, *post*.

(*l*) *The Cristina, u.s.*; *Haile Selassie v. Cable and Wireless, Ltd.*, [1938] Ch. 839; Keith, *Juridical Review*, L. 184 ff. See *Larivière v. Morgan* (1872), L. R. 7 Ch. App. 550; 7 H. L. Cas. 423; *Russian Bank for Foreign Trade, In re*, [1933] 1 Ch. 745.

(*m*) See Halleck, *International Law* (3rd ed.), i, 326, and the authorities there cited; Wheaton, i, 438.

(*n*) Hertslet, *Comm. Treat.*, x, 195; Wheaton, i, 444 ff.

(*o*) Regulations of the Congress of Vienna, Arts. II., IV. (Hertslet, *Comm. Treat.*, x, 194).

(*p*) See Hall, *International Law*, p. 354.

(*q*) These may be either envoys, envoys extraordinary, or ministers plenipotentiary (see Halleck, *International Law*, i, 328).

Certain privileges and immunities are generally conceded to a diplomatic agent by the foreign State to which he is accredited, and, generally speaking, these are as follows:—

- (1) Immunity for himself, his family, and suite from criminal jurisdiction and arrest (unless perhaps in a very flagrant case, where he might be detained) (*r*); the only remedy in such a case being an application to the State whom he represents for his recall, or, in more serious cases, an order to leave the country.
- (2) Exemption for himself, his family, and suite within certain limits from civil jurisdiction, the limits of such exemption being subject to various opinions by different writers, it being generally conceded, however, that the exemption extends at least as far as to protect him from arrest for debt, and in the possession of such property and goods as are necessary for the proper maintenance of his dignity and the execution of his duties. English law concedes a very wide exemption (*s*), tempered only by acceptance of the view that a Minister with the approval of his Sovereign may waive privilege, and then is liable to action, though not to execution. Moreover, if a Minister brings an action, he is subject to the jurisdiction so far as necessary to enable to justice be done (*t*). The Minister may authorise or require waiver by members of his suite (*u*), but otherwise it applies (*x*), and in case of doubt as to whether privilege attaches, the Secretary of State's declaration of recognition of diplomatic character suffices, as it does regarding the recognition of foreign States

(*r*) See Wheaton, i, 460 f.

(*s*) In England the privileges and inviolability of diplomatic agents are regulated (in part at least) by the statute 7 Anne, c. 12, passed in consequence of the arrest of the ambassador of the Czar, Peter the Great, for a debt of £50 contracted in London. By this Act all suits, actions and proceedings against any ambassador, and all bail, bail bonds, or judgments in connection therewith are to be absolutely null and void, and certain penalties are provided for persons offending against the Act, the benefit of which is extended to the domestic servants of the ambassador, except where they engage in trade. This Act has been held to be only declaratory of the common law and of the law of nations (see *Novello v. Toogood* (1823), 1 B. & C. p. 562). But where the ambassador voluntarily enters an appearance, he is not entitled to have the proceedings set aside by reason of privilege, provided his person or property are not interfered with: *Taylor v. Best* (1854), 14 C. B. 487; *Suarez, In re: Suarez v. Suarez*, [1918] 1 Ch. (C. A.) 176, at p. 200. The exemption would apply to a British subject: *Macartney v. Garbutt* (1890), 24 Q. B. D. 368. In the Union of South Africa also the position of diplomats is ruled by the Diplomatic Immunities Acts, 1932–34.

(*t*) Dicey and Keith, *Conflict of Laws*, p. 201. This applies equally to sovereigns, and a sovereign may be met by a rival claim of sovereignty, so that if both Governments are recognised, suit may be impossible: *The Arantzazu Mendi* (1938), 55 T. L. R. 71, 454.

(*u*) Cf. *Dickinson v. Del Solar*, [1930] 1 K. B. 376. The nature of immunity and of waiver is well seen in *Chung Chi Cheung v. R.* (1938), 55 T. L. R. 184, which deals with the position of a Chinese war vessel in British Colonial waters, a British subject thereon, a member of the crew, having murdered its captain, also a British subject. The Court negatived the doctrine of the complete extra-territorial character of such a ship, held that a diplomatic request for surrender of the accused from Hong Kong would, no doubt, have been accorded, but in absence thereof and in view of the Chinese Government allowing their servants to give evidence at the trial in Hong Kong there was effective waiver.

(*x*) *Engelke v. Musmann* [1928] A. C. 433; *The Amazon*, 59 T. L. R. 787.

- or Sovereigns (*y*). The privilege, of course, can be reduced in extent by accord with a foreign Government, as in the case of the U.S.S.R. under the Commercial Agreement of February 16, 1934. This is motivated by the trading activities of the Russian representative, which renders the ordinary rules inapplicable.
- (3) The diplomatic agent is regarded as being in an ex-territorial position, and therefore his house is free from the territorial jurisdiction, at least in so far as to prevent any interference with the performance of his duties. But this privilege must not be used to support abuse of the legal rights of individuals, at least in the case of illegal detention of a foreign subject in the embassy of his country (*z*).
- (4) Diplomatic agents and their property are exempt from taxation; but not apparently from local rates, unless (as in England) expressly exempted by statute (*a*). By courtesy, also, goods intended for their use are exempt from customs duty.

**Consuls.**—In addition to the diplomatic agents, who are appointed to act as a medium of intercourse between the Governments of one State and another, it is customary for a State to appoint consuls to reside in foreign countries, for the purpose of looking after the interests of its subjects when within the foreign territory, of performing certain official acts, and, in a few backward countries, of exercising jurisdiction acquired by the State with regard to its own subjects when within the foreign territory, such jurisdiction having been acquired by "capitulation, grant, usage, sufferance, or other lawful means" (*b*). Generally, the duties of consuls or consular agents relate to such matters as the administration of the estates of subjects of their own country dying abroad; arbitrations on matters brought before them by fellow-subjects; various duties under the Merchant Shipping Acts and in the matter of air navigation; the care of shipwrecked sailors and other fellow-subjects in distressed circumstances; the legalisation of judicial or other acts for use in their own country by affixing the consular seal; the celebration of marriages under the Foreign Marriage Act, 1892, &c. Consuls also grant a *visa* to passports, and issue passports to British subjects not provided with passports; the Foreign Office does not issue passports to persons not within the United Kingdom. They also communicate with their Government in case of injustice done to a fellow-subject, and collect statistics and furnish full reports upon commercial and other matters (*c*).

There are various degrees of consular rank, viz., consuls-general, consuls, vice-consuls, and consular agents; the latter are appointed by consuls; the others, like ambassadors, by the Crown. The com-

(*y*) *Aksionairnoye Obschestvo A. M. Luther v. Sagor & Co.*, [1931] 3 K. B. (C. A.) 532; *Duff Development Co., Ltd. v. Government of Kelantan*, [1924] A. C. 797.

(*z*) As to the abuse of the privilege in the case of Sun-Yat-Sen, who was illegally detained in the embassy of his country and ordered to be released by the Foreign Secretary, see Wheaton, i, 456.

(*a*) See *Parkinson v. Potter* (1886), 16 Q. B. D. 152.

(*b*) See the Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), Preamble.

(*c*) Wheaton, i, 480—485.

mission is communicated to the Government of the foreign country, and the consul's position and status is formally recognised by the latter by means of an *exequatur*, which may consist of a formal document signed by the Sovereign of the foreign country, or merely of an endorsement upon the original commission. Such acknowledgment may be withdrawn at the discretion of the State.

Consuls are not entitled to diplomatic privilege, though various concessions are usually made, such as exemption from jury or military service. The consular papers and documents ought to be respected. They are subject, however, to the ordinary Courts of the country in which they reside, in both civil and criminal matters.

**War and Peace.**—The right to make war vests in the Crown and, contrary to the law in France, formerly in Germany, and the United States, legislative approval is not necessary. The House of Commons (*d*), of course, must normally approve; even in 1782 its attitude forced George III. to make peace with the United States, and in 1914 the Government made certain of the support of the opposition and the House before accepting war. In the same way, in 1937, in Canada and the Union of South Africa alike the consent of Parliament to any participation in war—apart from mere defence—was asserted, and it is formally part of the constitution of Eire of 1937. (Arr. 28 (3).) But in 1857 Palmerston appealed successfully to the electorate against the condemnation of the Chinese war by the Commons (*e*). The Crown as part of its prerogative in peace and war alike controls the movements of the armed forces, as just before the outbreak of war in 1914 (*f*), on the withdrawal of the British forces from Germany, and the naval and air measures taken in 1935—36 to counter Italian hostility consequent on League sanctions. In the same way measures were taken in 1936—39 arising out of the Italian effort to dominate the Mediterranean by intervention in the Spanish civil war. The power to make peace is likewise vested in the Crown, and is part of the treaty power.

**Treaties.**—The power of making treaties or contracts between nation and nation belongs to every sovereign State, in so far as such State has not limited itself in the exercise of such right by compacts or treaties with other States. Even so, a State may contract an inconsistent treaty, leaving it to the State aggrieved by such action to protest. The Anglo-German naval agreement of 1935 (*g*) was plainly incompatible with the disarmament provisions of the treaty of Versailles, 1919, and was criticised on that ground in France; but France and Britain alike in 1938 refused to obey their obligations under Art. 20 of the Covenant of the League of Nations not to recognise the conquest *de jure* of Ethiopia, and to fulfil their obligations to

(*d*) In 1624, the Commons insisted on securing effective control over the fund they provided for the war (Tanner, Const. Doc. of James I., pp. 374—377). Both Charles I. and Charles II. had difficulty with their Parliaments on war issues.

(*e*) 144 Hansard, 3 s., 1846 (majority of sixteen votes).

(*f*) For the difficulties arising out of troop movements in Ulster, see Asquith, Fifty Years of Parliament, ii, 149—153.

(*g*) Parl. Pap., Cmd. 4953; July 17, 1937, Cmd. 5519.

Czechoslovakia. In non-sovereign or dependent States the power is either limited in extent or non-existent: *e.g.*, the various States of the American Union, or the provinces of the Dominion of Canada, or the States of Australia, which cannot conclude treaties with foreign nations, since that power is vested in their respective Federal Governments. Treaties are known under various other names—conventions, exchanges of notes, protocols, which are usually supplementary in character, declarations, or in some instances General Acts, *e.g.*, the General Acts of the Berlin and Brussels Conferences of 1885 and 1890. The Anglo-Italian accord of 1938 took the form of an agreement consisting of a protocol with annexes and exchanges of notes, and a *bon voisonage* agreement and exchanges of notes between the United Kingdom, Egypt and Italy. Exchanges of notes often clear up moot points. Convention is applied to some cases to multilateral agreements such as those on international exhibitions (1928), international regime of maritime ports (1923), or slavery (1926), but also to commercial treaties and agreements, which are, however, also termed commercial treaties. Declarations are not merely declaratory of existing law; that of London, 1909, was a great amending measure. Pact has recently become notorious from the Locarno (1925) and Kellogg (1928) Pacts, both of which became in 1938—39 largely ineffective.

The terms of a treaty in the full sense of that term are to be distinguished from agreements—however styled—between Governments, because they are formally concluded in the names of the heads of States. The criterion is not absolute, but it is in accordance with the views of the Imperial Conference, 1926, which found that there were difficulties in any less formal procedure, since it was desirable to make it clear that treaties proper did not apply between the units of the Empire (*h*). They are usually agreed upon by agents, appointed for the purpose by the treaty-making authority in either State, who are vested with full powers under the Great Seal, signed by the King, on the authority of a sign manual warrant countersigned by the Foreign Secretary. Where the terms of the treaty have been agreed upon, the treaty, which is invariably (though not necessarily) reduced into writing and signed by the agents, is sometimes binding without ratification (*i*); but the usual course is for the Sovereign to ratify the agreement come to, which is effected by a ratification signed by the King. The diplomats who sign the agreement or others in their place exchange the formal instruments of ratification and record the exchange. There is no absolute obligation on the Crown to ratify, and this is especially the case where, as in many foreign countries, the ratification requires the assent of the legislature, or, as in the United States, that of two-thirds of the Senate, which is not rarely unobtainable.

Other agreements between Governments are concluded less formally but by duly authorised representatives, and may be subject to ratification or confirmation. Those between parts of the Empire take this form, *e.g.*, the Ottawa agreements of 1932, that between the United

(*h*) Keith, *The Governments of the British Empire* (1935), pp. 95 f.

(*i*) See the discussion in Wheaton, i, 490 ff., upon this point.

Kingdom and the Union of South Africa, of August 30, 1935, and that between Canada and the United Kingdom in 1937 (*k*). One of the most unusual of British obligations is the guarantee of Czechoslovakia which is embodied in an annex to the Munich Agreement and refers to an offer of September 19, 1938, to that State. Fortunately it is never likely to be acted upon. A very informal type of agreement is that of September 30, 1938, between Mr. N. Chamberlain and Herr Hitler supplementary to the mere formal accord of September 29, regarding Czechoslovakia. Announced as a peace pact of great importance, it seems to be no more than an assertion of opinion by both statesmen that their peoples desire peaceful settlement of disagreements, and to have no binding force. The Munich agreement itself is signed by Herr Hitler, Signor Mussolini, Mr. Chamberlain, and M. Daladier, without any recital of full powers or representative character, a unique position.

*Power of the Crown to bind the Subject by Treaty.*—The constitutional law of many European and American States require the consent of the Parliament to the validity of most treaties, but this is not English law. A treaty can be concluded and ratified without reference to the legislature, and is internationally binding, thus obviating the difficult question of the effect of a treaty concluded without sufficient constitutional authority by the officers entrusted with the conduct of foreign affairs. But this international validity must be distinguished from the effect of a treaty made by the Crown on the law of England. International law is part of English law only so far as it is adopted by usage, judicial decision, or legislation (*l*). It is true that a rather wider view has at times been adopted (*m*), but it has never been given effect so as to override existing law (*n*), and the doctrine must now be deemed fixed though it is not wholly reconcilable with the exemption of trading vessels from the jurisdiction of the Courts. It seems clear that in certain spheres the Crown has wide powers. It can accept conventions, like the Hague Conventions, on issues of international law, such as days of grace, or the abolition of privateering, or the classification of contraband, or other issues affecting neutrality, without the sanction of Parliament. The great code of law, the Declaration of London, was in many respects put in operation during the war of 1914—18 without Parliamentary sanction being requisite, despite the fact that, when Parliament had been asked indirectly by assent to legislation to allow revision of decisions of British prize Courts by an International Appeal Tribunal to approve ratification, the House of Lords had denied assent to the bill in question. On the other hand, it

(*k*) Parl. Pap., Cmd. 4174, 4175 (1933); 5012 (1935); 5382 (1937).

(*l*) See *R. v. Keyn* (1876), 2 Ex. D. 63, 202; *West Rand Central Gold Mining Co. v. R.*, [1905] 2 K. B. 391; *Mortensen v. Peters* (1906), 8 F. (J. C.) 93, 101, per Lord Dunedin; *Vascongada (Compania Naviera) v. S.S. Cristina*, [1938] A. C. 485; Keith, *The Dominions as Sovereign States*, p. 341.

(*m*) *Dolder v. Huntingfield* (1805), 11 Ves. 283; *Novello v. Toogood* (1823), 1 B. & C. 554; *Wolff v. Ozholm* (1817), 6 M. & S. 92; *De Wütz v. Hendricks* (1824), 2 Bing. 314.

(*n*) Compare with *Stuart, V.-C.*, in *Emperor of Austria v. Day* (1861), 30 L. J. Ch. 690, the Court of Appeal in *Chancery*, 3 De G. F. & J. 217.

cannot alter international law without the aid of Parliament (o). Nor can the Crown alter the law of the constitution; it cannot by promising to pay money force the House of Commons to vote it; it cannot by mere treaty create a new tariff to prohibit importation (p). Nor normally can it deprive British subjects or aliens in British territory, of their private rights (q). Thus legislation has been necessary to prohibit any use of the Red Cross symbol for mercantile purposes inconsistent with the convention of July 27, 1929, regarding wounded and sick in armies on the field (r), and to prohibit the use of the trade designation "port" of any but Portuguese production (s). On the other hand, the Crown can by agreement with a State, recognising it, legalise the confiscation by its authority of private property of its subjects abroad (t), and it seems to be generally conceded, moreover, that the Crown may make a treaty ceding territory without the consent of Parliament, thus depriving British subjects of their nationality (u), and it has been claimed that treaties concluding peace are also valid without Parliamentary sanction (x). But since the cession of Heligoland in 1890 was made subject to Parliamentary approval (y) despite Gladstone's disapproval, and the objection of Queen Victoria to recourse to Parliament echoed in 1904 by Edward VII. over the accord with France which involved the cession of the Îles de Los, it is the rule to approve cessions by treaty, and all the treaties of peace were thus approved, as was the transfer of land to Italy by the Anglo-Italian Treaty (East African Territories) Act, 1925 (z). In the same way the surrender of the Dindings territory to the Sultan of Johore was formally

(o) *The Zamora*, [1916] 2 A. C. 77; *contra The Fox* (1811), 1 Edw. 312—314.

(p) *Eire (Confirmation of Agreement) Act*, 1938 (1 & 2 Geo. VI. c. 25).

(q) *The Parlement Belge* (1879), 4 P. D. 129. The question in this case, as decided by Sir R. Phillimore, was whether the Crown by a convention concluded with Belgium arranging for the carrying of the English mails by certain Belgium packet boats belonging to the Belgian Government, or freighted by order of the Government, could confer upon such Belgian packet boats the status of Belgian ships of war when in British ports. Sir R. Phillimore decided that the Crown had no authority "to clothe with immunity foreign vessels which are really not vessels of war" (*ib.* p. 155) and judgment was therefore given against the *Parlement Belge*, which had collided with an English boat in Dover harbour. Whereas, if the status of a ship of war could have been conferred by the convention, the *Parlement Belge* would have been outside the jurisdiction, the rule of international law being that a ship of war, being government property, is outside the jurisdiction of a foreign Court. The judgment of Sir R. Phillimore was subsequently reversed in the Court of Appeal, on the ground, however, that the *Parlement Belge* was outside the jurisdiction, as being in the employ of the Belgian Government, independently of the convention. (See *The Parlement Belge* (1879), 5 P. D. p. 220 (C. A.).)

(r) 1 Edw. VIII. & 1 Geo. VI. c. 15; cf. the Geneva Convention Act, 1911 (1 & 2 Geo. V. c. 20), in respect of the earlier convention. It applied to the whole Empire, but now the Dominions legislate separately, and special power was given to the Commonwealth of Australia by the Act of 1937 (s. 2).

(s) 5 Geo. V. c. 1.

(t) *Aksionairnoye Obschestvo A. M. Luther v. Sagor & Co.*, [1921] 3 K. B. (C. A.) 532.

(u) Cf. *Damodhar Gordhan v. Deoram Kanji* (1876), 2 App. Cas. 332; *Lachmi Narayan v. Raja Pratab Singh* (1878), Ind. L. R. 2 All. 1.

(x) Cf. *Walker v. Baird*, [1892] A. C. 491, where the question whether a *modus vivendi* with France could be enforced by executive action in Newfoundland was not decided directly, because the plea raised was act of State, and this was negatived.

(y) 53 & 54 Vict. c. 32; 347 Hansard, 3 s. 764. Followed in 1904 by the Anglo-French Convention Act, 4 Edw. VII. c. 33.

(z) 15 & 16 Geo. V. c. 9.

sanctioned by the Dindings Agreement Approval Act, 1934 (*a*), in which, as in the case of the transfer of Jubaland to Italy, provision was made for protecting the nationality of existing British subjects. On the other hand, in 1935, the right appears, rather improperly, to have been asserted to transfer without legislative sanction portions of protected areas, apparently over the heads of the residents therein, but the refusal of Italy to consider any accord with Ethiopia precluded the carrying out of the curious project (*b*). But in India exchanges of territory with the Indian States have been, and still may perhaps be made, without Parliamentary assent.

**Foreign Enlistment.**—By the rules of international law, as generally received, no breach of neutrality is committed by the Government of a State in permitting its subjects to build, fit out, and *bond fide* sell a ship of war to a friendly State engaged in a war with another friendly State, or in selling arms and ammunition to such a State. Ships of war and arms are articles of commerce, and neutrals are entitled to continue their ordinary commerce with belligerents, subject to the risk of capture and confiscation of their goods if they are contraband (*c*).

Though this is so from an international standpoint, England has, since the year 1819 (*d*), adopted the policy of making it a statutory offence to fit out or equip warlike vessels for the use of a belligerent. The Foreign Enlistment Act, 1819, was passed “to prevent the enlisting or engagement of his Majesty’s subject to serve in foreign service, and the fitting out or equipping in his Majesty’s dominions vessels for warlike purposes without his Majesty’s licence.”

In 1868 a commission (*e*) was appointed to inquire into the working of the Act of 1819, and the results of the recommendations made by this commission were embodied in the Foreign Enlistment Act of 1870, which is now in force (*f*).

The Act re-enacts in greater detail the rules of 1819 and also contains provisions against taking on board any ship within his Majesty’s dominions, and without his Majesty’s licence, persons referred to in the Act as illegally enlisted persons; and against aiding the equipment of foreign ships, or fitting out naval or military expeditions without his Majesty’s licence (*ff*).

The Act, as its wording clearly shows, applies to both parties in a *de facto* civil war, even when the insurgents are not recognised by the Crown as belligerents. This was decided in respect of Cuban insur-

(*a*) 24 & 25 Geo. V. c. 55. So also the Straits Settlements and Johore (Territorial Waters (Agreement) Act, 1928 (18 & 19 Geo. V. c. 23)).

(*b*) Keith, *Letters on Current Imperial and International Problems*, pp. 139–141.

(*c*) See Wheaton (ed. Keith), ii, 970 ff. The decision adverse to the United Kingdom in the case of the *Alabama*, *Florida*, and *Shenandoah* under the Treaty of Washington, 1871, was based on the rather artificial rules therein laid down.

(*d*) 59 Geo. III. c. 69. Two previous Acts, viz., 9 Geo. II. c. 30, and 29 Geo. II. c. 17, made it a felony punishable with death to enter the service of a foreign State. But these Acts were passed with the object of preventing the formation of Jacobite armies in France.

(*e*) The Neutrality Laws Commission, 1868.

(*f*) Extended to Air Force by Order in Council, S. R. & O., 1918, No. 458, under 7 & 8 Geo. V. c. 51, s. 13.

(*ff*) 33 & 34 Vict. c. 90.

gents in 1870 (*g*), and it remains inexplicable how it was not realised by the British Government until late in the Spanish conflict (*h*). Responsibility for its operation rests, of course, with the Home Secretary, and with the naval forces, under King's Regulations for the Navy, Art. 955, but only as ancillary to foreign policy. In 1936 the decision in September to accept complete non-intervention in the Spanish conflict led to the passing of the Merchant Shipping (Carriage of Munitions to Spain) Act (1 Edw. VIII. c. 1), and this was added to in March, 1937, by the Merchant Shipping (Spanish Frontiers Observation) Act, 1937, intended to complete non-intervention by establishing a system of supervision over all efforts to send either munitions or volunteers to Spain (*i*).

The Act extends to England, and to all the dominions of his Majesty, including the adjacent territorial waters, and it has been extended to British protectorates and to places where the Crown exercises jurisdiction as regards British subjects by Orders in Council of October 24 and November 14, 1904, as regards Bahrein, August 12, 1913, and Kuwait, February 21, 1935. It was violated conspicuously in the Irish Free State in December, 1936, when a thousand men embarked outside territorial waters on a foreign ship *en route* to serve in General O'Duffy's Irish Brigade on the Spanish-Italian rebel side. The British authorities, however, failed to stop the departure of other "volunteers" from Liverpool in British vessels.

The Washington treaties of 1922 and the London treaty of 1930, now almost completely lapsed, limited construction of naval armaments and the use of submarines is regulated; these treaties were duly confirmed by Acts of Parliament, and a like procedure was requisite for the London treaty of 1936 (*k*). On the other hand, the Paris treaty of August 27, 1928, for the renunciation of war as an instrument of international policy, did not require legislative enactment, as opposed to approval by the Commons as a matter of policy, as also in the case of the Locarno Pact of 1925, the acceptance of the optional clause of the Statute of the Permanent Court of International Justice in 1929, and that of the General Act of 1928 for the Pacific Settlement of International Disputes in 1931.

**Extradition.**—Extradition rests on treaty (including the important Convention of May 4, 1910, for the suppression of the White Slave Traffic), and Act of Parliament, superseding any prerogative power which may have existed (*l*). It falls within the sphere of the Home Secretary to execute the Act. The formal procedure rests on a request by the foreign Government to the Foreign Office, supported by evidence

(*g*) *R. v. Carlin*; *The Salvador* (1870), 6 Moo. P. C. (N. S.) 509.

(*h*) Keith, *Letters on Current Imperial and International Problems*, 1935—36, p. 219, n. 1; *The Scotsman*, November 25; December 1 and 21 in which the issue of a warning to British subjects was suggested; it was only given in January, 1937; Keith, *The King, the Constitution, the Empire and Foreign Affairs*, 1936—37, pp. 160, 162—167.

(*i*) 1 Edw. VIII. & 1 Geo. VI. c. 19.

(*k*) 12 & 13 Geo. V. c. 21; 20 & 21 Geo. V. c. 48; 1 Edw. VIII. & 1 Geo. VI. c. 65.

(*l*) *East India Co. v. Campbell* (1749), 1 Ves. Senr. 246; *Mure v. Kays* (1811), 4 Taunt. 34, throw doubt on any right; but the Crown can refuse entry: *Musgrove v. Chun Teeong Toy*, [1891] A. C. 272.

of the crime or of conviction; if *primâ facie* in order, the Home Secretary instructs the Chief Metropolitan Magistrate at Bow Street, who requires the police to act, but a warrant may be issued by the magistrate on sworn information, and executed pending the receipt of the formal documents; it has even been said that the police may arrest on suspicion. The magistrate investigates, and commits to prison for surrender to the foreign authorities if he is satisfied that there is a *primâ facie* case of a crime of the type covered by the treaty (*m*) having been committed by the accused, whose identity must be shown; that the accused is not excluded from extradition by any treaty provision (*n*); and that he is not being prosecuted for what is really a political offence or with the intention of so prosecuting him. Fifteen days are allowed for the accused to test the legality of the proceedings by *habeas corpus*, but it is doubtful whether the High Court will revise the holding of the magistrate that a *primâ facie* case exists. Persons extradited to England can only be tried for offences which can be proved by the facts on the strength of which extradition was secured (*o*). The principles of surrender are laid down in the Acts (*p*); extradition for a political offence is forbidden (*q*). There can be no surrender if trial has already taken place in England. If the crime abroad is brought about by a person actually present in England, extradition is possible (*r*).

**The League of Nations.**—Parliament has approved the covenant of the League of Nations (*s*) and the permanent membership of the British Government in the Council of the League; periodically it is informed of and accepts the Governmental policy. At the election of 1935 adherence to the support of the League was a keynote of that policy (*t*); it has been already noted that in the view of the Labour and Liberal parties the attitude of the Government towards Ethiopia and Spain proved a negation of its professions and a betrayal of its mandate. It is now clear that the British Government regards the terms of the Covenant as no longer binding. Thus on October 6, 1938, Mr. Chamberlain stated that "we had no treaty obligations and no legal obligations to Czechoslovakia" (*u*), and Lord Maugham on November 3 (*x*)

(*m*) *E.g.*, it must be shown that a crime was committed in a place in the territory of the demanding power, not merely that the accused was there convicted: *Kosse-kechatko v. Att.-Gen. of Trinidad*, [1932] A. C. 78.

(*n*) *The Queen v. Wilson* (1877), 3 Q. B. D. 42.

(*o*) *R. v. Corrigan* (1930), 22 Cr. App. R. 106.

(*p*) See 6 & 7 Vict. c. 75 (France, 1843); c. 76 (United States, 1843); 33 & 34 Vict. c. 52; 36 & 37 Vict. c. 60; 58 & 59 Vict. c. 33; 36 & 37 Vict. c. 88, s. 27 (slave trade); 6 Edw. VII. c. 15 (bribery); 22 & 23 Geo. V. c. 39 (dangerous drugs); 25 & 26 Geo. V. c. 25 (currency). Orders in Council are issued in respect of each treaty.

(*q*) *Castioni, In re* [1891] 1 Q. B. 149; *Meunier, In re*, [1894] 2 Q. B. 415.

(*r*) *R. v. Nillins* (1884), 53 L. J. M. C. 157; *R. v. Godfrey*, [1923] 1 K. B. 24.

(*s*) As part of the treaties of peace approved by legislation; Treaty of Peace Act, 1919 (9 & 10 Geo. V. c. 33). By a very undesirable stretch of authority the use of sanctions against Italy in defence of Ethiopia was justified under this Act in 1935—36; see Keith, *Letters on Current Imperial and International Problems*, 1935—36, pp. 145—148; The King, the Constitution, the Empire and Foreign Affairs, 1936—37, p. 27.

(*t*) Cf. Mr. Lloyd George's speech, Llandudno, January 19, 1939, citing Mr. Chamberlain's election manifesto.

(*u*) 339 H. C. Deb. 5 s., 546.

(*x*) 110 H. L. Deb. 5 s., 1678 f.

in discussing the agreement with Italy of April 16, 1938, asserted the right to recognise a conquest without a single reference to the Covenant, though Art. 10 imposes a categorical obligation on the Crown to maintain against external aggression the territorial integrity and political independence of all members of the League, and Art. 20 imposes a solemn undertaking not to enter into any agreement inconsistent with the Covenant. No more striking proof exists of the doctrine that treaties are subject to a *rebus sic stantibus* implication.

Parliament has approved the acceptance of the Optional Clause of the Statute of the Permanent Court, so far as the House of Commons is concerned. The failure of the Government to allow the House of Lords to express any view binding on it, illustrates the supremacy of the Crown over Parliament in the exercise of its control over foreign affairs, so long as it is supported by the Commons and can give effect to its decisions without legislation.

**Imperial Foreign Policy.**—The British Government assumes responsibility for naval defence for the whole of the Empire, not excluding the Dominions, though Australia and New Zealand have substantial local forces. The Union of South Africa in 1937 was not willing to accept any binding results of the Imperial Conference of 1937 (*y*), and its Minister of Defence did not attend. The Canadian Government also made it clear that its defence policy implied no acceptance of any binding agreement. The crisis of September, 1938, showed the deep anxiety of the Dominions for peace at almost any price, and their approval of the abandonment of Czechoslovakia, and the bringing into force of the Anglo-Italian agreement of April 16 on November 16, was accepted by the Union and the Commonwealth of Australia, Eire having already recognised the conquest *de jure*. In January Canada intimated recognition. Considerable increases of war preparations have been made in all the Dominions and in 1938 Mr. Pirow, Minister of Defence of the Union, visited England to secure arrangements for supplies of aeroplanes. The British controls the foreign affairs of all parts of the Empire save the Dominions (other than Newfoundland); in the case of the Dominions it co-operates with them on a basis of consultation, but without power to bind any Dominion against the will of its Government.

**The Royal Prerogative in War.**—The Crown has power in war to declare a blockade, to determine contraband (*z*), to regulate reprisals (*a*), to requisition British ships in territorial, perhaps in foreign waters (*b*), to appropriate the property of a neutral under the *jus angariæ* (*c*),

(*y*) The Dominions and Britain strongly deprecated any effort to form accords on ideological bases (*i.e.*, with democratic states). In January, 1939, Germany, Italy, and Japan had added Hungary and Czechoslovakia to their ideological grouping, necessitating national efforts at self-defence in Britain.

(*z*) See Wheaton, *Inter. Law* (ed. Keith), ii, 1027 ff.

(*a*) The Order in Council of 1915 retaliating for the German submarine action was held valid: *The Zamora*, [1916] 2 A. C. 77, 98; *The Stigstad*, [1919] A. C. 279.

(*b*) *The Sarpon*, [1916] P. 306, 311; *The Broadmayne*, [1916] P. 64, 67, 68.

(*c*) *Commercial and Estates Co. of Egypt v. Ball* (1920), 36 T. L. R. 526; *Commercial and Estates Co. of Egypt v. Board of Trade*, [1925] 1 K. B. 271.

subject to compensation, to regulate questions of naval prize (*d*), to lay embargoes on shipping (*e*), to forbid subjects or aliens to leave the realm (*f*), and to enter on the land of a subject to erect fortifications (*g*), or to dig for saltpetre (*h*).

**Statutory Powers in War.**—The Crown was given in war power to conscribe men for service against the enemy (*i*), and to issue regulations for the defence of the realm (*k*). The widest authority was exercised and in large measure permitted validity by the Courts, in special in case of internment of persons suspected of disloyalty (*l*), less freely in matters of property (*m*); thus it was held that it was improper to deprive any person of the full value of commandeered goods (*n*), or to forbid access to the Courts (*o*), and impossible to raise taxation (*p*), or convert steamers into profit-making businesses (*q*).

Both in war and peace the Crown has full powers to restrict importation, exportation or carriage coastwise of arms, ammunition and other military and naval stores (*r*).

**Executive Declarations on Foreign Issues.**—In matters affecting foreign relations the Courts are normally willing to assign to the executive the power of authentic declarations of facts which involve legal relations. Thus they will not insist on deciding for themselves the issue whether a specified person is entitled to be regarded as able to claim diplomatic privilege (*s*), though, if there were no assertion by a Secretary of State, they would assert the right of decision. Similarly, they will accept the declaration of the executive as to the status of a foreign State or its Government (*t*), and as to the question of recognition (*u*), though they might again decide for themselves if the executive

(*d*) *The Elsebe* (1804), 5 Ch. Rob. 173, 181; see also Naval Prize Act, 1864 (27 & 28 Vict. c. 25); Army Prize Money Act, 1832 (2 Will. IV. c. 53).

(*e*) *Merchant Adventurers Co. v. Rebow* (1687), 3 Mod. Rep. 126.

(*f*) 1 Bl. Com., 14th ed., 270; 3 Co. Inst. 179.

(*g*) *Warren v. Smith, Magdalen College Case* (1615), 1 Roll. Rep. 151.

(*h*) *King's Prerogative in Saltpetre* (1606), 12 Co. Rep. 12.

(*i*) Military Service Acts, 1916 (5 & 6 Geo. V. c. 104), 1916 (session 2) (6 & 7 Geo. V. c. 15), (Review of Exceptions), 1917 (7 Geo. V. c. 12), (Conventions with Allied States), 1917 (7 & 8 Geo. V. c. 26), 1918 (7 & 8 Geo. V. c. 66), 1918 (No. 2) (8 Geo. V. c. 5). All have expired August 31, 1921; S. R. & O., 1921 (No. 1276).

(*k*) Defence of the Realm Consolidation Act, 1914 (5 Geo. V. c. 8), repealing 4 & 5 Geo. V. cc. 29, 63.

(*l*) *R. v. Denison* (1916), 32 T. L. R. 528; *Ronnfeldt v. Phillips* (1918), 35 T. L. R. 46; *R. v. Halliday*; *Zadig, Ex parte*, [1917] A. C. 260; *R. v. Wormwood Scrubbs Prison (Governor)*, [1920] 2 K. B. 305.

(*m*) Cf. *Hudson's Bay Co. v. Maclay* (1920), 36 T. L. R. 469, 475.

(*n*) *Newcastle Breweries Co. v. R.*, [1920] 1 K. B. 854, a not decisive case: see *Robinson v. R.*, [1921] 3 K. B. 183.

(*o*) *Chester v. Bateson*, [1920] 1 K. B. 829.

(*p*) *Att.-Gen. v. Wilts United Dairies* (1922), 91 L. J. K. B. 897.

(*q*) *China Mutual Steam Nav. Co. v. Maclay*, [1918] 1 K. B. 33.

(*r*) Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 138 and s. 43; Customs and Inland Revenue Act, 1879 (42 & 43 Vict. c. 21), s. 8; *Hunter & Co. v. Coleman*, [1914] 1 Ir. R. 372; cf. *Att.-Gen. v. Brown*, [1920] 1 K. B. 793 ([1921] 3 K. B. 29, on appeal after legislation). See, also, for Spain, 1 Edw. VIII. c. 1.

(*s*) *Engelke v. Musmann*, [1928] A. C. 433, overruling the contrary view in the C. A.; *Banco de Bilbao v. Sancha*, [1938] 2 K. B. 176; *Vascongada (Compania Naviera) v. S.S. Cristina*, [1938] A. C. 485; *Haile Selassie v. Cable and Wireless, Ltd.*, [1938] Ch. 839.

(*t*) *The Gagara*, [1919] P. 95; *The Annette*, *ib.* 105; *Duff Development Co. v. Govt. of Kelantan*, [1924] A. C. 797.

(*u*) See p. 336, note (*g*), *ante*.

refused clear guidance. By statute (x), the executive has binding power to declare the nature and extent of any foreign jurisdiction of the Crown (y). The right to declare the extent of British territory is analogous and is exercised by the Home Secretary (z). So executive declarations are decisive on the existence of war (a), unless, of course, the matter is statutorily regulated, as in the case of the termination of the war of 1914.

It must, however, be remembered that the Courts will only accept clear statements by the executive of matters essentially within executive power. It may be, for instance, that the Crown could declare it has withdrawn its protection from an alien who acted hostilely, and that the Courts would regard him as an alien enemy (b), but they will not do so merely because of facts which would justify such executive action.

(x) 53 & 54 Vict. c. 37, s. 4.

(y) *Ratshedi Khama v. Ratshosa*, [1931] A. C. 784; Keith, Journ. Comp. Leg., xix, 118 f.

(z) *The Fagernes*, [1927] P. 311.

(a) *Janson v. Driefontein Consol. Mines*, [1902] A. C. 404.

(b) *Johnstone v. Pedlar*, [1921] 2 A. C. 262.

## CHAPTER II.

## THE NAVY.

*The Naval Forces.*

THE naval forces consist of His Majesty's Royal Navy and the Naval Reserve.

The development of the navy was relatively slow, for the efforts of Alfred, John, Edward III. and Henry V. were transient. A permanent force was the creation of the Tudors, but definite form was given under Charles II., in considerable measure through the efforts of Samuel Pepys as Secretary to the Admiralty, a system of half-pay being adopted, and legislative authority for discipline being given, following the precedent set under the Long Parliament (a).

**Maintenance of the Navy.**—Apart from suspicion of Charles I.'s raising of shipmoney (1634—37), Parliament does not seem at any period of our history to have regarded the maintenance of the naval force by the Crown with the same jealousy with which it regarded the maintenance of the army. The reason of this is not hard to discern, for a navy could hardly be used as a means of oppression, or as a support to the exercise of arbitrary authority in derogation of the liberties of the subject, while at the same time its existence was manifestly necessary for the adequate defence of an insular Power. Hence no special Parliamentary sanction was or is required for the navy beyond the granting of the necessary supplies, and its numbers are not limited by statute. In 1938—39 the number of men contemplated was up to 119,000, and the cost £123,707,000 (of which £30,000,000 fell to be borrowed), for the changed conditions of Europe in 1937 decided the Government on a policy of spending on the armed forces £1,500,000,000 in five years, borrowing up to £400,000,000 (b). The crisis of September, 1938, led to the mobilisation of the fleet, so that at one time about 146,500 officers, seamen, boys and royal marines were borne on the estimate. On November 14, therefore, was presented a supplementary estimate for 27,500 personnel. For 1939—40, £149,399,000 (£80,000,000 borrowed), and 133,000 personnel, are provided.

**Entry and Term of Service.**—Impressment was the regular means of recruiting for the navy down to the nineteenth century, and it was recognised by statute (c). It is still apparently legal at common law in time of war, though it was not resorted to during the war of 1914

(a) 7 Lords Journ. 255.

(b) For the British proposals of disarmament, see Cmd. 4189 (1932); 4437 (1933); for progress, 5374 (1936); 5682 (1937). For the re-armament loan, see Cmd. 5368, 5374 (1937). The total was doubled in 1939.

(c) See 2 Ric. II. st. 1, c. 4; 2 Phil. & Mary, c. 16; 5 Eliz. c. 5; 16 Car. I. cc. 5, 23, 26; 5 & 6 Will. IV. c. 24.

to 1918, but only seafaring men are liable to impressment, and only then under warrant issued by the Admiralty in pursuance of a proclamation by the Crown or of an Order in Council (*d*).

Wrongful impressment is a civil injury for which damages may be recovered, and wrongful and malicious impressment is a gross misdemeanour for which a person is liable to fine and imprisonment.

At the present time officers in the navy, who are recruited in various ways, at different ages, for differing periods, hold their commissions from the Admiralty, and an officer may not resign his commission so as to cease to be a person belonging to his Majesty's navy without the consent of the Admiralty (*e*).

Recruits are obtained by enlistment under the Naval Enlistment Acts, 1835 to 1884 (*f*), by which it is provided that no person may be detained in the navy for a term of more than five years against his consent, unless he has entered or re-entered for a longer term, which he may do in accordance with the regulations made from time to time by the Admiralty (*g*). Service in fact normally is for twelve years from age eighteen, but re-engagement thereafter to obtain pension, is now encouraged. In the case of emergency the services of seamen and marines due for retirement can be prolonged up to five years' further service: this was done by proclamation of September 28, 1938, but they were released by proclamation of November 25, 1938.

**The Naval Reserve.**—The Naval Reserve consists of forces raised under various Acts. These are—

- (1) The Royal Naval (Volunteer) Reserve, commonly known as the Royal Naval Reserve (*i*), raised under the Royal Naval Reserve (Volunteer) Act, 1859 (*k*). It is recruited as regards officers and men from those who follow the sea as a calling. They are engaged for a term of five years subject to an annual training, and may re-enrol. Entry for men is from eighteen to twenty-seven. They may be called out by proclamation for actual service on shore or at sea for a term of three years, extendible to five years by proclamation (*l*). By proclamation of September 28, 1938, officers and men of the Royal Naval Reserve and of the Royal Naval Volunteer Reserve, and men of the Royal Fleet Reserve were called out but released in November.

(*d*) See *Broadfoot's Case* (1743), Foster, 154; *R. v. Tubbs* (1776), 2 Cowp. 517; *Anthony Barrow's Case* (1811), 14 East, 346. In the American War the right to impress was widely extended and *habeas corpus* denied: 19 Geo. III. c. 75.

(*e*) *Hearson v. Churchill*, [1892] 2 Q. B. 144, C. A.; *R. v. Cumming*; *Hall, Ex parte* (1887), 19 Q. B. D. 13.

(*f*) 5 & 6 Will. IV. c. 24; 16 & 17 Vict. c. 69; 47 & 48 Vict. c. 46; short title given by 55 & 56 Vict. c. 10; 3 Edw. VII. c. 6, s. 4 (1).

(*g*) 47 & 48 Vict. c. 46, s. 2. See King's Regulations and Admiralty Instructions, vol. i, ch. viii.

(*i*) See 63 & 64 Vict. c. 52, s. 1. See also Royal Naval Reserve Act, 1927 (17 & 18 Geo. V. c. 18), and for officers, 26 & 27 Vict. c. 69, s. 2; 35 & 36 Vict. c. 73, s. 17; Naval Reserve (Officers) Act, 1926 (16 & 17 Geo. V. c. 41).

(*k*) 22 & 23 Vict. c. 40; 59 & 60 Vict. c. 33, s. 1.

(*l*) 22 & 23 Vict. c. 40, ss. 4, 5; 63 & 64 Vict. c. 17. Regulations have been made by the Admiralty in 1922 and since reviewed.

- (2) The Royal Fleet Reserve, a new division of the Royal Naval (Volunteer) Reserve raised under the Naval Reserve Act, 1900 (*m*). The term of service is limited in the case of pensioners by the conditions attached to the pension, or in other cases by the terms of the enlistment or employment (*n*). In 1939 it was made possible for men to engage to undertake service without waiting for a general calling out. It is open to men who have served for five years in the Royal Navy or the Royal Marines not over five years earlier or in the Fleet Reserve; there is no fixed age. In other respects they are subject to the provisions of the Royal Naval Reserve (Volunteer) Act, 1859. The numbers of the last two mentioned forces are not subject to any limit (*o*).
- (3) The Royal Naval Volunteer Reserve raised under the Naval Forces Act, 1903 (*p*). It is recruited from those who do not normally follow the sea as a profession, age from eighteen to twenty-eight. This force is subject to the provisions of the Royal Naval Reserve (Volunteer) Act, 1859, subject to certain modifications.

The Naval Coast Volunteers and the Naval Artillery Volunteers were disbanded in 1873 and 1892 respectively.

In addition to these there are certain other forces generally spoken of as forming part of the Naval Reserve.

These are: (1) the Royal Naval Volunteer (Wireless) Reserve, constituted by Order in Council of August 8, 1932, under 28 & 29 Vict. c. 73, s. 3; for those between eighteen and forty-five willing to serve in emergency; (2) the Royal Naval Volunteer Supplementary Reserve, constituted in 1937 to secure enrolment of yacht owners and others (eighteen to twenty-five) willing to take commissions in the Reserve in war time if called upon (*q*); (3) the Royal Naval Auxiliary Sick Berth Reserve recruited from members of the St. John Ambulance Brigade; (4) the Royal Marine Police Special Reserve.

Provision also exists permitting the creation of a force of Royal Marine Volunteers under the Naval Forces Act, 1903 (*r*), and subject to the enactments in force relating to volunteers, with the proviso that they are to be available for service beyond the seas. Officers and men of the coastguard or revenue services, and all sea-faring men belonging to other Government departments (*s*), and petty officers

(*m*) 63 & 64 Vict. c. 52; 3 Edw. VII. c. 6, ss. 4, 5. For service of marine pensioners or ex-service men, see also 17 & 18 Geo. V. c. 18, s. 2.

(*n*) 63 & 64 Vict. c. 52, s. 3.

(*o*) 3 Edw. VII. c. 6, s. 5.

(*p*) *Ib.* Regulations have been drawn up by the Admiralty, January, 1923, and periodically amended. See also 8 Edw. VII. c. 25.

(*q*) No legal obligation is imposed on such men to accept, but no doubt is felt as to acceptance, if needed.

(*r*) 3 Edw. VII. c. 6. For the marines, see p. 365, *post*.

(*s*) 16 & 17 Vict. c. 73, ss. 13—17, 21; 47 & 48 Vict. c. 46. The coastguard under 15 & 16 Geo. V. c. 88, has been transferred to the control of the Board of Trade, but power is reserved to the Admiralty to retransfer it on emergency (*s. 2*).

and seamen of the Royal Navy who are in receipt of pensions, may be required to serve for not more than five years (*t*).

**Air Duties.**—By an Order in Council of November 4, 1938 (No. 1365) under the Naval Forces Act, 1903, there is constituted an Air Branch of Officers of the Royal Naval Volunteer Reserve to supplement the category of officers of the Royal Navy for air duties by Order in Council of February 24, 1938 (No. 171).

### *Naval Discipline.*

The naval forces were in early times regarded merely as an adjunct to the land forces, and such sailors as were required for the transport of troops no doubt came under the regulations drawn from time to time for the military forces generally by the King, with the advice of the constable and earl marshal. After the battle of Sluys in 1340, which gave England the command of the seas, the navy acquired new importance, and towards the close of the fourteenth century admirals were appointed who exercised certain disciplinary jurisdiction over the naval forces (*u*). From 1408 a single lord high admiral was appointed, and in 1661 an Act was passed for the regulation of the naval forces, giving the lord high admiral power to issue regulations for the trial of offences by court-martial (*x*).

The regulations for the trial and punishment of offences committed by seamen are now contained in the Naval Discipline Acts of 1866 and 1884 (*y*), as amended recently by the Naval Discipline Act, 1922, and the Government of India (Indian Navy) Act, 1927, and the Naval Regulations, and these Acts, unlike the Army Act, which must be re-enacted annually, are permanent.

**Persons Subject to the Naval Discipline Acts.**—The principal persons subject to the Acts are: (1) Every person in or belonging to his Majesty's navy and borne on the books of one of his Majesty's ships in commission (*z*); (2) land and air forces when embarked on any of his Majesty's ships to such an extent as provided by Order in Council (*a*); (3) all other persons ordered to be received or passengers on board his Majesty's ships subject to regulations made by the Admiralty (*b*); (4) persons who engage to serve in any ship and agree to be under Admiralty discipline even if not on board (*c*); (5) marines

(*t*) *Ib.*

(*u*) See *ante*, p. 257.

(*z*) 13 Car. II. c. 9. See also 22 Geo. II. c. 33, for extension of powers in respect of acts done by crews on shore outside the British Dominions. The question, of course, was that of reconciling naval control with the territorial jurisdiction. The Naval Discipline Act, s. 101, saves the jurisdiction of the ordinary Courts.

(*y*) 29 & 30 Vict. c. 109; 47 & 48 Vict. c. 39; 9 Edw. VII. c. 41, s. 1, Sch.; 5 & 6 Geo. V. c. 73; 7 & 8 Geo. V. c. 34, s. 1; 9 & 10 Geo. V. c. 11, s. 16 (1); 12 & 13 Geo. V. c. 37; 17 & 18 Geo. V. c. 8, s. 2; 1 & 2 Geo. VI. c. 64; all printed as the Naval Discipline Act.

(*z*) N. D. A., s. 87.

(*a*) *Ib.* s. 88; Army Act, s. 186; King's Regulations, Art. 803; Order in Council, May 4, 1923 (S. R. & O., 1923 (No. 567), p. 678). So also as regards air forces, Air Force Act, s. 186; Order in Council, July 19, 1918 (S. R. & O., 1918 (No. 969), II. 536).

(*b*) S. 89; King's Regulations, Art. 726.

(*c*) S. 90; King's Regulations, Art. 744.

when serving on board his Majesty's ships to such an extent as may be provided by Order in Council (*d*), and subject to the other provisions contained in the Army Act; (6) officers and men of the naval reserve forces, officers and men in the coastguard and revenue services, and petty officers and seamen in receipt of pensions at such times and subject to such provisions as are contained in the various Acts relating to such persons.

Such persons are subject to the Acts for all offences committed in any harbour, haven, or creek, or on any lake or river, in or out of the United Kingdom, or anywhere within the jurisdiction of the Admiralty, or at any place on shore out of the United Kingdom, or in any of his Majesty's dockyards, yards, wharves, arsenals, barracks, hospitals, canteens, recreation places, &c.; in or out of the United Kingdom (*e*).

In addition, certain offences, neglect of duty, mutiny, insubordination, desertion and absence without leave, misconduct in the presence of, and communications with the enemy, and miscellaneous offences, are made punishable under the Act if committed anywhere on shore, whether in or out of the United Kingdom (*e*).

In view of the creation of independent Dominion navies power has been taken to adapt by Order in Council the Naval Discipline Act so as to regulate relations between the royal navy and these forces (*f*). There is also given by the British Commonwealth (Visiting Forces) Act, 1933, authority for the granting of aid to such forces in carrying out their own codes of discipline, but it has not so far been found necessary to execute it (*g*) save to provide for relative ranks of members of home and Dominion forces serving together in the army (*h*).

In the event of the co-operation of naval, military and air forces, provision is made for the regulation of discipline by the joint action of the Admiralty, Army Council, and Air Council (*i*).

**Features of Naval Discipline.**—Offences under the Acts include misconduct in the presence of, and communications with, the enemy, neglect of duty, mutiny, insubordination, desertion, absence without leave, disobedience to orders, waste or embezzlement of stores, improperly losing ship, cruelty by officers, misconduct as regard prize ships, and other naval misconduct as well as ordinary crimes. They are triable by court-martial, or, if committed by seamen, except in the cases expressly provided for or made capital by the Acts, they may be tried summarily by the officer in command of the ship to which the offender belongs, but he may not award penal servitude, or imprisonment or detention over three months (*k*). The Admiralty

(*d*) Army Act, s. 179 (18).

(*e*) N. D. A., s. 46.

(*f*) 1 & 2 Geo. V. c. 47, s. 1 (1) (*b*); for Canada, Order in Council, June 28, 1920; for Australia, August 12, 1913; New Zealand, July 16, 1920 (S. R. & O., 1920 (Nos. 1409, 1407, 1408), pp. 208, 205, 210). Like provision is made for India by 17 & 18 Geo. V. c. 8, ss. 1 (4), 3; see also 26 Geo. V. & 1 Edw. VIII. c. 2, ss. 105, 320—321, Sch. 10.

(*g*) 23 & 24 Geo. V. c. 6.

(*h*) S. R. & O., 1935, No. 595, in Army Orders, August, 1935.

(*i*) 5 & 6 Geo. V. c. 30, s. 13; 7 & 8 Geo. V. c. 51, s. 7, Sch. I., Pt. I.; Naval Discipline Act, s. 90 A; Army Act, s. 184 A; Air Force Act, s. 183 A.

(*k*) N. D. A., 1866, s. 56; 46 & 47 Vict. c. 39, ss. 1, 8.

was authorised in 1915 to constitute disciplinary Courts for the trial of offences by officers in time of war (*l*). The constitution and procedure of naval courts-martial are regulated by the Act and by general orders issued under it, which must be approved on a report of the Judicial Committee by Order in Council (*m*). The number is from five to nine, and commissions are granted by the Admiralty. In default of the judge advocate of the fleet, or his deputy, or any person appointed by the Admiralty or commander-in-chief of the fleet or squadron, the president of the court-martial must appoint a deputy judge advocate (*n*), whose duty it is to send a report of the proceedings to the commander-in-chief or senior officer, who must transmit it to the secretary of the Admiralty; copies of this report can be obtained by any person tried by court-martial at any time within three years of the final decision (*o*). The rules of the Criminal Evidence Act, 1898, have been applied to court-martial proceedings (*p*).

There is no need for confirmation by the Admiralty of court-martial proceedings. But the Admiralty may dispose as they think fit of any matter thus dealt with.

Sailors, like soldiers, are not exempt from jurisdiction of the ordinary civil and criminal Courts, and the Naval Discipline Act specially declares that nothing in the Act shall prevent any person triable under the Act from being tried in a civil Court in respect of any offence punishable or cognisable by the common or statute law (*q*).

Sailors (excepting commissioned officers) are protected from arrest for debt, unless the debt was contracted at a time when the debtor did not belong to his Majesty's service, and unless the plaintiff has made an affidavit to that effect (*r*). Though the scale of crimes and penalties is regulated by the Acts, any crime not punishable by death or penal servitude may be punished according to the laws and customs used at sea (*s*).

#### *The Civil Courts and the Administration of the Armed Forces.*

The civil Courts have a certain measure of control over the administration of the naval and other armed forces of the Crown (*t*), though no appeal lies from the decisions of naval or other courts-martial. They can, of course, investigate the legality of every action done by members of the armed forces to non-members, and the chief difficulty which has arisen is the degree of responsibility of subordinates for acts ordered by their superiors. They can also investigate the question of the right of courts-martial or other authorities to inflict punishment on persons alleged to be subject to naval or military or air law (*u*), and can award damages against a military officer who,

(*l*) 5 & 6 Geo. V. c. 73, s. 2. There must be three to five officers, and punishments below detention only are allowed.

(*m*) October 11, 1923 (No. 1291); June 25, 1925 (No. 605); February 21, 1935 (No. 138).

(*n*) N. D. A., ss. 61, 69.

(*o*) *Ib.* s. 69.

(*p*) 61 & 62 Vict. c. 36, s. 2 (*a*); King's Regulations, Art. 693 (2).

(*q*) N. D. A., s. 101.

(*r*) S. 97.

(*s*) S. 44.

(*t*) These points may be taken to apply to the navy, the army, and the air force.

(*u*) Cf. *Wolfe Tone's Case* (1798), 27 St. Tr. 614 (*habeas corpus*). Prohibition would presumably lie to prevent trial, and *certiorari* to quash proceedings.

in excess of his jurisdiction, commits an action which amounts to false imprisonment or other common law wrong (*x*). But where jurisdiction exists the position of the Courts is less clear.

**Liability of Subordinate for Illegal Acts done under Orders.**—The law on this point seems to be that, if acting honestly in discharge of his duty, a soldier or sailor will not be liable for wrongful acts committed in obedience to the orders of a superior, unless it can be shown that such orders were clearly and manifestly illegal (*y*).

The ordinary rule of law is that a man must justify any direct violation of the personal rights of another (*z*), and in such a case he must justify, not only by showing that he had orders, but that the orders were such as he was bound to obey (*a*). A state of actual war might be held sufficient justification for obedience to any order, whether clearly and manifestly illegal or not (*b*), but this is doubtful. To judge from the decision of the Court of Appeal in Palestine on the case of one of the men accused of the murder of an Arab prisoner, a very wide latitude will be allowed to soldiers in suppressing a rebellion (*c*).

In *R. v. Thomas* (*d*), where a sentry on board H.M.S. *Achille*, who had been ordered to keep all boats off, and had been supplied with three blank cartridges and three ball, under a mistaken sense of his duty fired and killed a man, the jury found that he had acted under the mistaken impression that it was his duty. But the case being reserved for the judges, it was unanimously held to be murder, with the proviso that it was a proper case for a pardon.

**Liability of Superior to Subordinate for Acts done in the Exercise of his Authority.**—Whether an action by a person subject to naval or air force military law lies against a superior officer for acts done within his authority, but maliciously and without probable cause, appears doubtful.

In *Sutton v. Johnstone* (*e*), Johnstone having caused his inferior officer Sutton to be arrested and tried by court-martial for neglect of duty, cowardice, and disobedience to orders, and Sutton having been honourably acquitted by the court-martial, the latter brought an action against his superior before a special jury at the Guildhall for false

(*x*) *Heddon v. Evans* (1919), 35 T. L. R. 642. Cf. *Warden v. Bailey* (1811), 4 Taunt. 67.

(*y*) *Per Willes, J.*, in *Keighly v. Bell* (1866), 4 F. & F. at pp. 790, 805.

(*z*) See *Hayling v. Okey* (1853), 8 Ex. 531.

(*a*) *Keighly v. Bell*, *supra*, at p. 805.

(*b*) *Ib.* p. 790.

(*c*) *The Times*, January 24, 1939.

(*d*) Russell on Crimes (6th ed.), iii, 94. Contrast *R. v. Smith* (1900), 17 Cape Supreme Ct. Rep. 561, where the Court held that the order to shoot was not manifestly illegal. For the murder of Sheehy Skeffington in 1916 by an insane officer, see Cd. 8376: the soldiers were not tried. For a discussion of shooting by members of the Irish Free State Special Branch, see Hanna, J., in *Lynch v. Fitzgerald*, [1938] I. R. 382 High Court, April 5, 1937, when he expressed the view that the shooting of a youth was really manslaughter. Four soldiers were, in January, 1939, put on trial for manslaughter of an Arab prisoner in Jaffa, but the Court of Appeal quashed the sentences on three and reduced to eighteen months the one sentence allowed to stand: *The Times*, January 27, 1939. Naturally the overturning of the Court below was regarded as nullifying the value of the trial.

(*e*) (1787), 1 Bro. P. C. 76.

imprisonment and malicious prosecution, and recovered £6,000 damages.

The defendant brought a motion in the Court of Exchequer in arrest of judgment, which was discharged; but on writ of error in the Exchequer Chamber the judgment was reversed on the ground that the absence of reasonable and probable cause had not been shown.

In *Dawkins v. Paulet* (*f*), which was an action for libel in consequence of defamatory matter contained in a report made by a superior officer to the commanding officer, it was held by two judges out of three (Lord Chief Justice Cockburn dissenting) that an officer cannot maintain an action against his superior officer for acts done in the discharge of his duty, even though done maliciously and without reasonable, probable, and justifiable cause, but that he must pursue the redress prescribed by the articles of war (*g*).

This view is supported by subsequent authority and may possibly not be open to review by any Court save the House of Lords (*h*), the justification being that there is possible redress by the means provided by the Acts governing the armed forces. It is certain that officers generally are not liable for acts done *bonâ fide* through mistake or misapprehension in the exercise of their duty, and in the absence of cruelty, malice, and oppression (*i*).

**Wrongful Enlistment.**—When impressment has been resorted to, the civil Courts have asserted the right to examine the legitimacy of enlistment (*k*). But in normal circumstances irregularity of enlistment or re-engagement in the army or the air force can under legislation (*l*) be dealt with only by the Army or Air Council.

**Wrongful Dismissal.**—Officers in the army (and this would apply to all non-commissioned officers and men of all three services, and also to all Crown servants) hold their commissions *durante bene placito*, and are therefore liable to instant dismissal without notice or cause assigned. The Court will not, therefore, entertain an action for wrongful dismissal against the superior authorities, or inquire into the grounds of the dismissal, either on Petition of Right or in any other proceedings (*m*).

(*f*) (1869), L. R. 5 Q. B. 94.

(*g*) See now Army Act, s. 42; Air Force Act, s. 42; Naval Discipline Act, s. 37.

(*h*) *Dawkins v. Lord Rokeby* (1875), L. R. 7 H. L. 744; 8 Q. B. 255, 271; *Marks v. Frogley*, [1898] 1 Q. B. 888; *Fraser v. Hamilton* (1917), 33 T. L. R. 431; *Fraser v. Balfour* (1918), 34 T. L. R. (H. L.) 502; *Heddon v. Evans* (1919), 35 T. L. R. 641. The question was not decided in *Keighly v. Bell* (1866), 4 F. & F. 763. *Dawkins v. Paulet* is adversely criticised by the High Court of the Commonwealth in *Gibbons v. Duffell* (1932), 47 C. L. R. 520.

(*i*) See *per* Lord Mansfield in *Wall v. Macnamara*, cited in *Sutton v. Johnstone* (1 Term. Rep. at p. 536).

(*k*) Clode, *Mil. Forces*, ii, 8, 587; *Broadfoot's Case* (1743), Foster, 154. So under the Military Service Act, 1916, *Freyberger, Ex parte*, [1917] 2 K. B. 129; *Vecht v. Taylor* (1917), 116 L. T. 446; *Dawson v. Meuli* (1918), 118 L. T. 357; *Gschwind v. Huntington*, [1918] 2 K. B. 420.

(*l*) Army Act, s. 100; Air Force Act, s. 100.  
(*m*) *Tufnell, In re* (1876), 3 Ch. D. 164; and see *Grant v. Secretary of State for India* (1877), 2 C. P. D. 445; *Dickson v. Combermere (Viscount)* (1863), 3 F. & F. 527; *Denning v. Secretary of State for India* (1920), 37 T. L. R. 138. No claim for pay can be enforced by action or petition of right: *Leaman v. The King*, [1920] 3 K. B. 663; see p. 197, *ante*.

**Obedience to Superior Authority.**—It is the duty of the armed forces to obey the instructions of their superior commanders without regard to their political sympathies, and of the commanding officers to carry out the orders given by the Ministry, so long as these are legal. It is not proper for any officer or soldier to ask for assurances as to orders which he may be required to obey, either for safeguarding public property or the support of the civil power in the ordinary execution of its duty, or for the protection of the lives and property of the inhabitants in the case of disturbance of the peace (*n*).

**British Forces Overseas.**—The Crown has power to station forces of any kind in any part of the Empire, including protectorates and mandated territories, and, subject to international law, in any foreign waters or territory. In fact considerable forces were formerly stationed in Iraq, where air force units are still maintained under treaty of June 30, 1930, and also in Palestine, while a large garrison is stationed in Egypt (*o*). The last regular Dominion garrison disappeared from South Africa in 1921. The application of the Army and Air Force Acts to forces anywhere, in or without the dominions, is made clear in the Army and Air Force (Annual) Act (*e.g.*, 1939, s. 2 (2)). In the case of the Dominions, by a constitutional convention the consent of the Dominion Government is requisite for such stationing, and then the service Courts of the United Kingdom forces have (1) authority to act under the Imperial Acts, and (2) in doing so they are exempt from local interference under Canadian and Union of South Africa Acts, which are analogous to the Visiting Forces (British Commonwealth) Act, 1933 (*p*), which applies to forces of these Dominions when in the United Kingdom (*q*).

(*n*) See the Curragh incident: Oxford, Fifty Years of Parliament, ii, 149—153; Keith, *The King and the Imperial Crown*, pp. 165, 260.

(*o*) Their position is regulated by the treaty of August 26, 1936, which was modified entirely in favour of Egypt by a protocol of September 22, 1938; Parl. Pap., Cmd. 5360 and 5861. The legal position in Egypt having been greatly altered by the renunciation of consular jurisdiction under the Convention of Montreux, May 8, 1937, the authority reserved over the forces of the Crown and the Military Mission is exercised under the Egypt Order in Council, 1937 (October 2, S. R. & O., 1937, No. 936, p. 759).

(*p*) 23 Geo. V. c. 6; Keith, *Journ. Comp. Leg.*, xv, 355 f. The only Dominions to which the new system, based on the Statute of Westminster, 1931, at present applies, are Canada, the Union, and the Irish Free State. In the last named the treaty of 1921, which has been given legislative force by the Constitution, sufficed to justify the presence of the forces, but it was denounced as improper by Mr. de Valera (broadcast to Dominions, March 17, 1937), and under an agreement of April 25, 1938, confirmed by the Eire (Confirmation of Agreements) Act, 1938 (1 & 2 Geo. VI. c. 25), all British forces were withdrawn, and their presence on Eire territory would be illegal.

(*q*) The relative ranks of the home naval, army and air force officers and those of Canada, Australia, New Zealand and Union of South Africa have been determined by regulations under the Act, s. 4 (5), June 25, 1935. The Act may be applied to colonies, mandated and other territories.

## CHAPTER III.

## THE REGULAR AND AUXILIARY FORCES.

*The Regular Forces.*

**Definition.**—The regular forces, as defined by the Army Act (a), consist of such officers and soldiers as by their commission, terms of enlistment, or otherwise are liable to render continuous service to his Majesty in any part of the world, including the Royal Marines, his Majesty's Indian and Burma forces, the Royal Malta Artillery, and of soldiers of the reserve forces (comprising the army reserve and the militia) when called out on permanent service (b). In addition to these, certain troops are raised by order of his Majesty beyond the limits of the United Kingdom or of India or Burma (c), and are maintained under the authority of the Colonial Office. These would come under the above definition in cases where, by the terms of their enlistment or otherwise, they are liable to serve in any part of the world.

Prior to the declaration of war with Germany in August, 1914, the regular army at home numbered 121,000 men of all ranks and arms, the regular army abroad 117,000 men (viz., white troops in India, Egypt, South Africa, and elsewhere), whilst the army reserve numbered 146,000 men (d). In 1938—39 the army estimates were fixed at £106,500,000, an increase of £22,237,000 on 1937—38, £21,143,000 to be borrowed from the loan of £400,000,000 for defence. It was anticipated that the Army reserve would rise from 130,000 to 142,000 in April, 1939, the special reserve from 25,000 to 30,500. The regular army including the troops in India and Burma, 1,200 and 22,000 men short. On January 1, 1939, the territorial army establishment was 224,039.

It was made clear on March 10, 1938, that the army served three purposes, home defence, defence of British territories overseas and of ports or sea routes, and co-operation in the defence of allied territory;

(a) The Army Act, 1881 (44 & 45 Vict. c. 53), is in accordance with the Army (Annual) Act, 1885 (48 & 49 Vict. c. 8, s. 8 (2)), printed annually as amended down to the passing of the current Army (Annual) Act, under the style of Army Act.

(b) Army Act, s. 190 (8), (9); 58 & 59 Vict. c. 7, s. 9.

(c) As to such troops being subject to military law, see Army Act, ss. 175 (4), 176 (3).

(d) See the speech of the Secretary of State for War (*The Times*, March 11, 1914). The Army and Air Force (Annual) Act, 1939, provides for 185,700 as the strength of the land forces (not including those in India and Burma), and 118,000 of the air force. In 1938, regular army at home numbered 114,000; in India and Burma, 57,000; Gibraltar, 2,900; Malta, 5,000; Egypt, 12,000; Sudan, 1,900; Palestine, 5,000; Bermuda and Jamaica, 1,070; Malaya, 8,000; China, 10,000; other stations, 1,130. The cost, 1939—40, will be £161,133,000 (£66,232,000 borrowed).

the subsidiary character of this requirement indicates the preference of giving aid by air power.

Enlistment is usually from eighteen to thirty years of age. The units are Cavalry (Royal Dragoons and Scots Greys); Royal Armoured Corps; Royal Artillery, Field Artillery and Coast Defence and Anti-Aircraft branch; Royal Engineers; Royal Corps of Signals; Foot Guards; Infantry of the Line; Royal Army Service Corps; Royal Army Medical Corps; Army Dental Corps; Army Educational Corps; and Corps of Military Police.

**Maintenance of a Standing Army.**—Prior to the Revolution of 1688 and the subsequent recognition by Parliament of a regular standing army upon a legal footing, there had been two legal kinds of military forces at the disposal of the Crown, and these were (1) the old *feudal levy*, resulting out of the tenures by military service; (2) the old *fyrd*, of which the trained or train bands of the towns may be reckoned a part, and which became known as the *militia* during the reign of Charles I.

The feudal levy declines with the commutation of military service into money payments, which were found much more convenient by the Crown than personal service, limited to forty days and reluctantly performed. Sometimes also contracts were entered into by the nobles with the Crown for the supply of voluntary recruits, as in the French wars of Henry III. and Edward II. Henry V.'s wars in France were carried on by men hired by the King or supplied by indenture with nobles. The old feudal system of obtaining troops fell entirely into disuse when the feudal tenures were abolished in 1661 (e); Charles I. had vainly revived it in 1639.

The *fyrd*, or militia, could legally be used for domestic or defensive purposes only, and could not be sent abroad (f), though they could be employed in Scots or Welsh wars. The Assize of Arms (1181) and Statute of Winchester (1285) provided for the maintenance of arms. Originally these troops were under the supervision of the sheriffs, who were replaced by the lords lieutenants in the reigns of Edward VI. and of Mary. It was the control of this body, which formed one of the chief causes of dissension between Charles I. and the Long Parliament, but after the Restoration it was declared that "the sole supreme power, government, command and disposition of the militia is, and by the laws of England ever was, the undoubted right of His Majesty," and that "both or either of the Houses of Parliament cannot nor ought to pretend to the same" (g).

On the strength of their right to the military services of their subjects the practice of pressing men for service and issuing commissions of array was frequently adopted from the time of Edward I.; its abuse under the Stuarts rendered it natural that it should be declared illegal by the Long Parliament, except in case of sudden invasion or of

(e) 12 Car. II. c. 24.

(f) See 1 Edw. III. stat. 2, c. 5; 25 Edw. III. stat. 5, c. 8; 4 Hen. IV. c. 13.

(g) 13 Car. II. st. 1, c. 6; 14 Car. II. c. 3.

obligation by tenure (*h*). In fact since then impressment has never been applied save under statute, as in 1779, 1916—18, and 1939.

On the Restoration, therefore, the Crown could, apart from fresh statutory authority, only rely on the national militia, and it was virtually in the control of the local magnates, from whom the lords lieutenants, who chose the officers, had to be selected.

A force of guards to the Sovereign was maintained by Charles II. with Parliamentary sanction (*i*), and James II. increased their number to 30,000 on his own authority.

Parliament had always denied the right of the Crown to maintain on its own authority a standing army in time of peace as being a menace to the country and an aid to despotism, and whether the question was the unfettered control of the militia, as in the reign of Charles I., or the unauthorised additions of James to the *guards and garrisons* legally allowed him, the principle at stake was the same throughout. This question was finally disposed of by the Bill of Rights, 1689, which declared "that the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against law."

From 1689 to the present day the regular standing army has been maintained on a legal footing by means of annual Acts known down to 1879 as Mutiny Acts, later as Army Annual Acts, and now as Army and Air Force (Annual) Acts.

The Army and Air Force (Annual) Act performs two functions: (1) The preamble authorises the maintenance and limits the number of the forces to be raised in each year "for the safety of the United Kingdom and the defence of the possessions of His Majesty's crown (including those to be employed at the depôts in the United Kingdom for the training of recruits for service at home and abroad, but) exclusive of the numbers actually serving in India or Burma" (*k*). The preamble also recites the necessity for the employment of a force of marines under the Admiralty, without, however, limiting their number (*l*). Thus it provides the statutory authority required by the Bill of Rights for the maintenance of a standing army. (2) It re-enacts annually, and sometimes adds new clauses or makes amendments to, the Army Act and the Air Force Act, which with the regulations made thereunder form the code of military and Air Force law for the discipline of the forces authorised to be raised, and all other forces to which either Act applies. Thus it provides the statutory authority for the exercise of a special code of military law in time of peace, rendered necessary by the terms of Magna Carta, the Petition of Right, 1628, and the Bill of

(*h*) 16 Car. I. c. 28. The Wars of the Roses had rendered impressment normal; cf. 4 & 5 P. & M. c. 2, which sanctioned it, but was repealed by 1 Jac. I. c. 25.

(*i*) See Clode, *Mil. Forces*, i, 363, 364; 12 Car. II. c. 15; 18 & 19 Car. II. c. 1, s. 76. Hence dates the special connection of the Guards with the King's safety. Henry VII. in 1485 and Henry VIII. in 1509 had created the small Corps of Gentlemen-at-Arms and Yeomen of the Guard, whose services tended to become ceremonial.

(*k*) The words in brackets are omitted in the Army and Air Force (Annual) Act since 1937, but are understood. Prior to that Act, the exclusion was of those serving within His Majesty's Indian possessions, other than Aden.

(*l*) The marines are not included in the number actually authorised by the Act.

Rights, 1689. Parliamentary control is further secured by the rule that no troops may be maintained, even in war, by funds not voted by Parliament (*m*).

The Act does not empower the Crown to compel enlistment in time of peace or of war. In the European War of 1914—18 recourse was had to special legislation imposing compulsory service, but these Acts were repealed at the conclusion of hostilities. In 1936—37 it was repeatedly asserted by the Ministry that compulsory service was not contemplated by the Government, nor would it meet the needs of the Empire, and even after the war panic of 1938, this assurance was repeated, and in January, 1939, a voluntary appeal for helpers for defence was inaugurated; but compulsion was adopted in May.

**Entry on Service.**—Officers' commissions were formerly always issued by the Crown under sign manual, but by 25 & 26 Vict. c. 4, Her Majesty was empowered to direct by Order in Council that they should in future be issued under the signature of the commander-in-chief (whose duties have now devolved upon the Army Council (*n*)) and a principal Secretary of State, and in the case of the Marines under the signature of the Lords Commissioners of the Admiralty, power being reserved to His Majesty to issue any commissions under the sign manual in such cases as His Majesty may think fit. At times royal signature by stamp of commissions has been resorted to, but royal signature has been, when possible, maintained as desirable.

Officers in the army hold their commissions *durante bene placito*, and are liable to be dismissed at any moment without cause assigned. The Court has therefore no jurisdiction to inquire into the circumstances of the dismissal on Petition of Right or any other proceeding for wrongful dismissal (*o*). The same principle applies to all non-commissioned officers and men in the army, air force, or navy.

The enlistment of a soldier in the regular forces is effected by the recruiting officers delivering to the intending recruit a notice in the form authorised by the Army Council, stating the general requirements of attestation, and the general conditions of the contract to be entered into, and requiring him to attend before a justice of the peace (*p*). On appearance before the justice of the peace the questions in the attestation paper are read over to him and his answers taken down. Enlistment is completed by the intending recruit signing the declaration attached to the attestation paper, and taking

(*m*) This was conceded in 1816 by the ministry which had originally proposed to pay the army of 34,000 men in France out of funds received from the French Government: Clode, i, 102—104.

(*n*) The office of commander-in-chief has now been abolished, and the statutory powers formerly exercised by him are transferred to the Army Council by statute.

(*o*) *Tufnell, In re* (1876), 3 Ch. D. 164; *Dickson v. Combermere* (1863), 3 F. & F. 527; *Kynaston v. Att.-Gen.* (1933), 49 T. L. R. (C. A.) 300. An officer has no absolute right to resign his commission; see *Hearson v. Churchill*, [1892] 2 Q. B. 144; Clode, ii, 96. The practice of purchase of commissions sanctioned by Charles II. was finally abandoned in 1870. Cf. Clode, ii, 79—90; May, Const. Hist., iii, 274—277. The objections of the lords were overruled by the use of the statutory power given to the Crown by an Act of 1809. See Keith, *The British Cabinet System, 1830—1938*, pp. 206, 513.

(*p*) Army Act, s. 80 (1).

the oath of allegiance contained in the paper (*g*). After enlistment, save in time of emergency, a recruit may within three months of attestation purchase his discharge on payment of the sum of £20 for the use of His Majesty (*r*).

The term of original enlistment is for twelve years, or for such less period as His Majesty may fix; and the enlistment may be either for the whole period in army service, or for such portion in army service and the rest in the reserve, as the Army Council may from time to time fix (*s*). The Army Council has power to make regulations enabling a soldier to vary the conditions of service under his original enlistment as to the period in army service and with the reserve (*t*).

After the expiration of nine years from the date of his original enlistment the soldier may, with the assent of the competent military authority, extend his term of service for such term as will make up twenty-one years (*u*). Encouragement to re-enlist has been freely accorded since 1937.

Provisions are contained in the Act enabling His Majesty to prolong the term of service for the period of twelve months of any soldier who becomes entitled to his discharge while on service beyond the seas, or while a state of war exists, or while soldiers in the reserve are required by proclamation to continue in or re-enter upon army service; and while on service beyond the seas, or while a state of war exists, a soldier who becomes entitled to be transferred into the reserve may be detained in army service during the same period (*x*).

In time of imminent national danger or great emergency His Majesty in Council may by proclamation, the occasion being first communicated to Parliament if then sitting, or declared by the proclamation if not sitting, continue soldiers in army service who would otherwise be entitled to be transferred to the reserve (*y*).

**The Army Reserve.**—The constitution and regulation of the army reserve, which was first created in 1859 (*z*) by the Reserve Forces Act of that year, now depend upon the Reserve Forces Act, 1882 (*a*), and the various amending Acts.

Under the Act of 1882 there are two classes of the army reserve, whose terms of service differ. The second class of the army reserve is not liable to serve out of the United Kingdom (*b*).

The mode and form of enlistment for the army reserve is the same as that provided by the Army Act on entrance into the regular forces (*c*), and provision is made for annual training.

(*g*) *Ib.* s. 80 (2), (3), (4).

(*r*) *Ib.* s. 81.

(*s*) *Ib.* ss. 76, 77. Up to 1904 the usual terms of service were three years with the colours; since then the period is usually for infantry seven years with the colours and five years in the reserve, but various changes have been introduced, as long service overseas renders recruiting difficult. For earlier practice, see Clode, ii, 20—30.

(*t*) *Ib.* s. 78; 63 Vict. c. 5, s. 4.

(*u*) *Ib.* s. 84; and see, as to continuance in service after twenty-one years, *ib.* s. 85.

(*x*) *Ib.* s. 87.

(*y*) *Ib.* s. 88.

(*z*) 22 & 23 Vict. c. 42; Clode, i, 341—343.

(*a*) 45 & 46 Vict. c. 48; 53 & 54 Vict. c. 42; 54 & 55 Vict. c. 5; 61 & 62 Vict. c. 9; 62 & 63 Vict. c. 40; 63 & 64 Vict. c. 42; 4 Edw. VII. c. 5; 6 Edw. VII. c. 11; 8 Edw. VII. c. 2.

(*b*) 45 & 46 Vict. c. 48, ss. 3, 14 (3).

(*c*) *Ib.* s. 18.

The army reserve may be called out to aid the civil power in the preservation of peace, (1) by a Secretary of State, at any time when occasion requires; (2) by the officer commanding His Majesty's forces in any town or district on the requisition in writing of any justice of the peace.

His Majesty in Council may, by proclamation, call out the army reserve on permanent service in case of imminent national danger or great emergency, the occasion being first communicated to Parliament if then sitting, or declared in Council and notified by the proclamation if Parliament be not then sitting (*d*). If Parliament stands adjourned or prorogued for more than ten days from the date of the calling out of the reserves, it must be summoned by proclamation to meet within ten days (*e*).

Whilst called out on permanent service, the reserves form part of the regular forces, and are subject to the Army Act (*f*). They fall under it also when called out for training and exercise or for duty in aid of the civil power, or when employed in military service under the orders of an officer of the regular forces.

*Supplementary Reserves.*—In August, 1924, there were created a supplementary reserve of officers and a supplementary reserve for the purpose of supplying officers and technicians for the army on mobilisation. There now are:—

(1) The Supplementary Reserve of Officers is open to those from age eighteen to thirty, especially to those who have served in officers' training corps. They undergo annual training after an intensive preliminary training.

(2) The Supplementary Reserve of men provides personnel of various types available immediately on mobilisation, to form transportation and draft units, Royal Corps of Signals and Royal Engineer units, &c. Ages vary from nineteen to forty-five; there is regular training for certain classes of fifteen days.

(3) The Infantry Supplementary Reserve provides an additional reserve of trained men; entry is at ages seventeen to thirty, with an initial twenty-six weeks training and then fourteen days a year.

*The Militia or Special Reserve.*—Class I. and II. of the army reserve formed under the Reserve Forces Act, 1882, are composed entirely of men who have served in the regular forces; but by the Territorial and Reserve Forces Act, 1907, men who have not served in any of the regular forces may be enlisted into the army reserve, and when so enlisted are termed "Special Reservists," and may be re-engaged as such after serving their term (*g*). By the Territorial Army and Militia Act, 1921 (*h*), the special reserve is renamed the militia. Under the Act of 1907 the existing militia battalions were with the consent of their members in the main transferred to the special reserve.

(*d*) 45 & 46 Vict. c. 48, s. 12.

(*e*) *Ib.* s. 13; 11 & 12 Geo. V. c. 37, s. 4 (1), Sch. 2.

(*f*) *Ib.* s. 14 (2); Army Act, s. 190 (8), (9), and s. 176 (5).

(*g*) 7 Edw. VII. c. 9, s. 34.

(*h*) 11 & 12 Geo. V. c. 37, s. 2.

The position of the militia is now governed by certain provisions of the Acts relating to the army reserve and the special provisions of the Act of 1907. Provision is made for annual training and the conditions as to embodiment and disembodiment applicable to the army reserve apply to special reservists (*i*). While, however, these provisions remain, the raising of forces in this way is at present in abeyance.

Members of the special reserve and certain members of the first class ("A") of the army reserve, not exceeding 6,000, may agree in writing (in the case of the army reserve the period of service, originally two years, was increased to five by the Reserve Forces Act, 1937) to be liable to be called out on permanent service without any such proclamation or communication to Parliament as is required by the Reserve Forces Act, 1882. This power may only be exercised for service outside the United Kingdom, and must be reported to Parliament as soon as may be (*k*). These numbers do not count in the maximum authorised to be maintained.

Acceptance of a commission as officer in the reserve of officers does not vacate the seat of a member of Parliament (*l*).

**The Royal Marines.**—The necessity for maintaining a force of marines is recited in the preamble to the Army Annual Act, but the number to be raised is not limited by the Act (*m*). They consist, under Order in Council, October 11, 1923, of one corps, including infantry and artillery, and there is a corps of Royal Marine Engineers, created in 1919, and a Royal Marine Police Force, created in 1922 (*n*). They are liable to serve either on shore or on board ship. They form part of the regular forces (*o*), and when on shore or on board transport, merchant, and other ships and vessels, they are subject to the regulations contained in the Army Act, subject to any articles of war which may be made by the Admiralty (*p*). A general court-martial, however, can only be convened for the trial of a soldier of the marines by an officer under the authority of a warrant from the Admiralty, though a district court-martial may be convened by any officer having authority to convene a district court-martial for any soldier of any other portion of the regular forces (*q*).

During the time that they are borne on the books of any ship commissioned by His Majesty (otherwise than for service on shore), officers and men of the marines are subject to the Naval Discipline Acts (*r*). When on board a ship in commission, but borne on the books of such ship for service on shore, officers and men of the marines

(*i*) 7 Edw. VII. c. 9, s. 30. For changes in 1939, see Addenda.

(*k*) Reserve Forces and Militia Act, 1898 (61 & 62 Vict. c. 9), s. 1; Act of 1907, s. 32. The available infantry of "A" reserve had to be called up for service in Palestine in 1936: hence 1 Edw. VIII. & 1 Geo. VI. c. 17.

(*l*) Act of 1907, s. 36.

(*m*) Marines were formed in 1664, 1694 and 1739, but disbanded. Their permanent creation dates from 1755.

(*n*) Orders in Council, February 10, 1919; October 13, 1922, under 28 & 29 Vict. c. 73, s. 3. For the Royal Marine Police Special Reserve, see p. 352, *ante*.

(*o*) Army Act, s. 190 (8).

(*p*) See the preamble to the Army and Air Force (Annual) Act; Army Act, s. 179.

(*q*) Army Act, s. 179 (1), (2).

(*r*) *Ib.* s. 179 (15).

are subject to the Naval Discipline Acts to such an extent as His Majesty by Order in Council directs, or, in default of such direction, as is for the time being directed with regard to the other regular forces (s).

With regard to the term of enlistment, conditions of service, transfer to the reserve, or re-engagement or prolongation of service, the marines are not subject to the provisions of the Army Act (t), but to the special Acts relating to those matters (u).

**The Indian Forces.**—The Indian forces comprise (1) officers and men of the regular British Army serving in India, and (2) the Indian Army proper composed of native troops under British officers.

Officers and men of the British Army in India are subject to the Army Act, with certain modifications (x), but they are not included in the number of troops authorised to be raised by the preamble to the Army and Air Force (Annual) Act.

With regard to the Indian Army proper (y) the Government of India Act, 1858 (z), provided that the naval and military forces of the old East India Company were to continue, subject to all such Acts of Parliament, laws of the Governor-General in Council, and Articles of War as had then been passed. The Army Act has further provided that nothing in that Act contained is to affect the Indian military law respecting officers and soldiers or followers in His Majesty's Indian forces being natives of India; and the expression "Indian military law" means the Articles of War, or other matters, made, enacted or in force or hereafter to be made under the authority of the Government of India, and such articles are to extend to native officers, soldiers, and followers wherever they may be serving (a). This provision now applies to the military law in force under the authority of the legislatures of India and of Burma respectively under the constitution Acts of 1935.

It was provided by the Government of India Act, 1915, that, except in case of invasion, or under other sudden and urgent necessity, the

(s) Army Act, s. 179 (18). They are subjected to the Acts by Order in Council, February 6, 1882.

(t) *Ib.* s. 179 (12).

(u) As to term of enlistment, see 10 & 11 Vict. c. 63, s. 1; 20 Vict. c. 1. As to re-engagement and prolongation of service, 10 & 11 Vict. c. 63, ss. 3—5; 20 Vict. c. 1; 44 & 45 Vict. c. 58, s. 179 (12), (13); 9 Edw. VII. c. 3, s. 4, Sch. 2. For transfer from other regular forces, see 44 & 45 Vict. c. 58, s. 179 (12); 47 & 48 Vict. c. 8, s. 7; 49 & 50 Vict. c. 8, s. 7; 9 Edw. VII. c. 3, s. 4, Sch. 2.

(x) Army Act, s. 180 (1). The European forces of the East India Company were transferred to the Crown under 21 & 22 Vict. c. 106. Their control had been provided for by Imperial Acts from 27 Geo. II. c. 9, to 20 & 21 Vict. c. 66. They were merged in the regular army under 24 & 25 Vict. c. 74. The raising of such a force in Europe was sanctioned by 21 Geo. III. c. 65, s. 32; 39 Geo. III. c. 109.

(y) The power to raise forces is given in the Stuart charters to the company and in that of William III., September 5, 1698; Keith, *Const. Hist. of India*, pp. 155 ff., 188 ff.

(z) 21 & 22 Vict. c. 106.

(a) Army Act, s. 180 (2). And see 53 Geo. III. c. 155, s. 96; 3 & 4 Will. IV. c. 85, s. 73, as to the powers to make Articles of War for native troops; 24 & 25 Vict. c. 67, s. 22; 5 & 6 Geo. V. c. 61, s. 65 (1) (d). Under the new regime has been passed the Government of India (Adaptation of Acts of Parliament) Order, 1937 (S. R. & O., 1937, No. 230, pp. 978 ff.), which adjusts the Army Act, and the amendments made are now incorporated in the Army Act under the Army and Air Force (Annual) Act, 1937, s. 10. Burma is a distinct possession with an army independent of that of India.

expenses of any expedition carried on outside the Indian frontiers could not be defrayed out of the Indian revenues without the consent of both Houses of Parliament (b). This provision secured to Parliament control over the employment of Indian forces outside India. In view, moreover, of the fact that, by the preamble to the Army and Air Force (Annual) Act, the number of forces authorised to be maintained by the Crown was limited to a certain number, "exclusive of the numbers actually serving within His Majesty's Indian possessions," it was doubted whether any portion of the Indian Army could be employed outside India without special Parliamentary sanction. The objection taken by Parliament to the maintenance of troops by the Crown without Parliamentary sanction was, no doubt, due to jealousy of the Crown, now obsolete, and in its origin applicable to the United Kingdom only. Under the Government of India Act, 1935, the old restrictions on the use of Indian troops disappear in favour of the principle that the Governor-General may authorise employment outside India, but payment must be made from British funds unless the work on which they are employed is for the service of India (c). Now, by the Army and Air Force (Annual) Act, it is expressly provided that persons subject to military law shall not be exempted from the provisions of the Army Act in the event of the number of forces for the time being in the service of His Majesty, exclusive of the marine forces, being either *greater* or less than the number authorised (d). Parliament would doubtless now view with equanimity the employment of troops by the Crown above the number authorised, outside the United Kingdom (e).

**Colonial Forces.**—These are either forces raised by colonial Governments, or forces raised by order of His Majesty beyond the limits of the United Kingdom and India (f).

- (1) Forces raised by colonial Governments are ordinarily subject to the laws of their own colony, but when serving with the regulars they become subject to the Army Act, in so far as the law of their own colony may have failed to provide for their government and discipline (g). Colonial Legislatures may also apply the Army Act with such modifications as they think fit to their forces within or without the colony.
- (2) Forces raised by order of His Majesty beyond the limits of the United Kingdom, India and Burma, are subject to the Army Act when under the command of an officer of the regular

(b) 5 & 6 Geo. V. c. 61, s. 22. India's contribution to the cost of Indian forces used outside India in the war of 1914—18 were duly approved by Parliament.

(c) Keith, *Const. Hist. of India, 1600—1935*, pp. 400, 411. For the difficulty felt in 1788 by Pitt as to the forces raised for the Company, see Ilbert, *Govt. of India*, pp. 68 f.

(d) See 23 Geo. V. c. 11, s. 2 (3).

(e) A discussion on this point arose in 1878, when Indian troops were ordered to Malta: 240 Hansard, 3 s., 187, 213, 369, 515.

(f) See Army Act, ss. 175 (4), 176 (3). Colony includes protectorate (ib. s. 190 (23A)), and mandated territory; it included Aden (ib. s. 187A), even before it became in law a colony (April 1, 1937).

(g) Army Act, s. 177.

forces, but this provision is not to affect the application to such forces of any Act passed by the Legislature of a colony (*h*).

### *The Auxiliary Forces.*

Prior to the passing of the Territorial and Reserve Forces Act, 1907 (*i*), the auxiliary forces, as defined by the Army Act, 1881, consisted of the militia, the yeomanry, and the volunteers (*k*).

**The Militia.**—After the Restoration the King was declared to be the supreme head of the militia and all forces by sea and land, and the lord lieutenants of counties were empowered to call the militia together and employ them within the realm in cases of insurrection, invasion, or rebellion (*l*). In 1757 liability to provide for the militia became local, and the men to serve were chosen by ballot. Ballot was suspended from 1829 (*m*). It was seven times embodied to resist invasion or suppress insurrection between 1757 and 1858. Under the reorganisation system of 1870, by the Regulation of the Forces Act, 1871, the powers exercised by the lord lieutenant in relation to the militia, yeomanry and volunteers were revested in the Crown, to be exercised through a Secretary of State (*n*). The lord lieutenant was to retain the power of raising the militia by ballot when that method was adopted, and of recommending persons for appointment as junior officers of the militia (*o*). These provisions, with regard to the militia, were re-enacted by the Militia Act, 1882 (*p*).

By the Territorial Army and Militia Act, 1921, the power to raise and maintain a militia force of this kind ceased, the style being transferred to the special reserve, to which, under the Territorial and Reserve Forces Act, 1907, the old militia units had been transferred.

**The Yeomanry.**—The mounted volunteer troops known as the yeomanry were placed upon a statutory footing in 1804 by 44 Geo. III. c. 54, which empowered the Crown to accept the services of any corps of yeomanry, subject to such rules and regulations as should be made thereafter. Under the Act of 1907 the yeomanry units were transferred to the territorial force, and the power to raise yeomanry was terminated by the Act of 1921 (*q*).

**The Volunteers.**—The volunteers were first placed upon a statutory basis by the Volunteer Act of 1863, which empowered the Crown to accept the services of volunteer corps through the lords lieutenant of counties (*r*).

(*h*) Army Act, s. 176 (3).

(*i*) 7 Edw. VII. c. 9.

(*k*) 44 & 45 Vict. c. 58, s. 190 (12).

(*l*) 13 Car. II. st. 1, c. 6; 14 Car. II. c. 3; 15 Car. II. c. 4.

(*m*) 10 Geo. IV. c. 10; ballot, however, was authorised from 1830 to 1832. See Clode, i, 39—51.

(*n*) 34 & 35 Vict. c. 86, s. 6.

(*o*) *Ib*.

(*p*) 45 & 46 Vict. c. 49, ss. 5, 6.

(*q*) 11 & 12 Geo. V. c. 37, s. 4.

(*r*) 26 & 27 Vict. c. 65; 32 & 33 Vict. c. 81; 58 & 59 Vict. c. 23; 60 & 61 Vict. c. 67; 63 & 64 Vict. c. 39. The force thus created differed considerably from an earlier volunteer force under 42 Geo. III. c. 66; 44 Geo. III. c. 54; Clode, i, 334. That statutory authority should be given for acceptance of volunteer services was recognised by 19 Geo. III. c. 76, otherwise the control of Parliament would have been evaded.

The volunteers have now become merged in the territorial force by transfer of the various former units into the latter body under Orders in Council of 1908 and 1910 under the Territorial and Reserve Forces Act, 1907, and presumably no further corps will be raised under the Acts relating to the volunteers, which, however, remain unrepealed.

**The Territorial Army.**—The auxiliary forces of the Crown were completely reorganised by the Territorial and Reserve Forces Act, 1907 (s), and the territorial force was renamed the Territorial Army by the Territorial Army and Militia Act, 1921, in recognition of its important war services. It is now entrusted with responsibility for the gun and searchlight defence of the country against hostile air attack, for the defence of the ports and harbours of the country against hostile attack by sea, and for the provision of a field force to supplement the Regular Army either in defence of this country or of British interests abroad.

*County Associations.*—The initial step in the composition of the territorial force under the Act of 1907 was the formation of an association for each county, in accordance with schemes made for each county by the Army Council. The lord lieutenant normally is president, and not less than half the members are officers representing the branches of the Army; local authorities, universities, employers and workers may be represented.

The duties of the county associations (which have no powers of command or training over any of His Majesty's forces) are those of organisation and administration under the control of the Army Council, including recruiting, provision of ranges, buildings, and manœuvre areas, assisting cadet corps and rifle clubs, caring for reservists and discharged soldiers, and providing horses (t). The associations must annually submit a statement of requirements to meet expenditure, and the Army Council must pay to the associations out of money voted by Parliament such sums as they may consider requisite on the basis of the statements, and audited accounts must be rendered to the Council (u).

The Army Council may make regulations for carrying out the provisions of the Act as to the association, and may also make regulations on certain specified matters. These regulations must be laid before both Houses of Parliament as soon as may be (x).

County associations may appoint joint committees for any purpose in which they are jointly interested (y).

The Auxiliary Air Force and Air Force Reserve Act, 1924, makes provision for the constitution of county joint associations and auxiliary air force associations. The power has been executed by Order in Council, October 9, 1924.

(s) 7 Edw. VII. c. 9. Lord Haldane's scheme provided for a striking force (four cavalry brigades and six infantry divisions), and a home defence force of 300,000 men who could be trained on outbreak of war for six months before service voluntarily overseas.

(t) *Ib.* s. 2.

(u) *Ib.* s. 3. Individual members are not pecuniarily liable for acts done in carrying out the Act.

(x) *Ib.* s. 4.

(y) *Ib.* s. 5.

*Enlistment and Discharge.*—First appointments to the lowest rank of officers in the force are given to the person recommended by the president of the county association within thirty days after notice of a vacancy has been given to him. The mode of enlistment and attestation for recruits to the territorial force is the same as that which applies to the regular forces under the Army Act (z). The recruit may select the unit, corps and the area in which he is to serve. Certain corps are set aside to produce officers in war time, the Hon. Artillery Company, the Inns of Court Regiment, the Artists Rifles, and the 23rd Battalion Royal Tank Corps. The term of enlistment may not exceed four years. A man may be dismissed for any cause held valid by his commanding officer, subject to appeal to the Army Council (a). He may, except when the army reserve is called out, purchase discharge on three months' notice (b). But, even if due for discharge, he may be required to prolong his service for twelve months, if the army reserve is ordered out on permanent service (c). The army is primarily intended for service in the United Kingdom, but members may undertake to serve abroad, and it is now the practice to accept only recruits ready to do so, except for special purposes at certain ages. Anti-aircraft units undertake to come out or serve before the rest of the Army.

*Training and Embodiment.*—Members of the force may be called out during the first year to serve a preliminary training if so required by Order in Council, which specifies the number of days; and, unless dispensed with by the proper officer, they are also required to serve an annual training of not less than eight or more than fifteen days, or, in the case of the mounted portion, not more than eighteen days (d). At present, the training is fifteen days camp and twenty drills as a minimum with twenty additional drills for recruits in their first year. The ages are normally seventeen to thirty-eight, but forty-five for tradesmen and up to fifty in anti-aircraft and coast defence units.

The term of training may be extended up to thirty days by Order in Council for any part of the force. But any Order in Council for preliminary training, or for extending the annual training, must be laid before each House of Parliament for forty days; and if either House presents an address to the Crown opposing it, no further proceedings are to be taken (e).

Embodiment of all or part of the force may be directed (or revoked or varied) by the Army Council when a proclamation calling out the army reserve on permanent service has been issued. Where under a proclamation directions have been issued for calling out all the men of the first class of the army reserve, the Army Council *must* within one month issue directions for embodying all the men of the territorial force, unless an address is presented to the Sovereign by both Houses of Parliament, praying that they shall not be so embodied. Parliament, if separated by adjournment or prorogation for a period not expiring

(z) Act of 1907, s. 10, which applies s. 80 of the Army Act to the territorial force.

(a) *Ib.* s. 9 (4).

(b) *Ib.* s. 9 (3).

(c) *Ib.* s. 9 (5).

(d) *Ib.* ss. 14, 15.

(e) *Ib.* s. 16.

within ten days, must be summoned by proclamation to meet within that period. Directions for embodiment are not to issue until Parliament has had an opportunity of presenting an address to the Crown (*f*). Disembodiment of the force is effected by proclamation, the Army Council giving the necessary directions. Until such proclamation the Army Council may direct the embodiment of any part of the force, or the disembodiment of any embodied part, as it thinks fit (*g*).

Failure to attend training or drills, without leave or reasonable excuse, entails liability to a penalty not exceeding £5, recoverable summarily. Failure to attend on embodiment without leave or reasonable excuse constitutes desertion, and the offender may be tried by court-martial (*h*).

Non-commissioned officers and men become subject to military law when being trained, or when attached to regular forces, or when embodied, or when called out for actual military service in pursuance of any agreement (*i*). Officers and men enjoy minor privileges, such as exemption from jury service (*k*).

**Subsidiary Organisations.**—*National Defence Companies* now exist, affiliated to territorial units; they are formed of ex-soldiers, not under age forty-five. There is no training in peace. An *Auxiliary Territorial Service* is provided for women (age eighteen to forty-three for general service, eighteen to fifty for local service). There is an annual training. An *Officers' Emergency Reserve* is provided for those who are ready to serve on emergency, without training in peace. Those who have served in the Officers' Training Corps can join an Officers' Cadet Reserve.

#### *General Nature of Military Law.*

**Origin of Military Law.**—In early times the troops employed by the Crown, both at home and abroad, were subject to the regulations made by the Crown, in anticipation of war, with the advice of the Constable and Earl Marshal, and administered in the Court of the Constable and Earl Marshal (*l*). According to one derivation, this special code came to be known as *marshal*, and subsequently *martial* law.

The office of Constable, like that of Earl Marshal, was hereditary, and as such became extinguished by the attainder of the Duke of Buckingham in the reign of Henry VIII. The office of Constable being extinguished, the Court of the Constable and Earl Marshal should have ceased to exist, and the jurisdiction which it exercised

(*f*) Act of 1907, s. 17 (1), (2).

(*g*) *Ib.* s. 18 (1), (2).

(*h*) *Ib.* ss. 20, 21.

(*i*) Army Act, s. 176 (6A); for officers, see s. 175 (3A); the permanent staff are normally liable.

(*k*) Act of 1907, s. 23.

(*l*) Hale, Common Law, pp. 34 f., admits only the power of the Crown in time of war, and confines it to soldiers. For James I.'s commission of 1624 to the Mayor of Dover and others, see Clode, i, 422; it deals with soldiers and other persons joining with them, a natural extension.

reverted to the Crown (*m*). The undue extension of the right to deal with military offences in time of war by applying it in time of peace both to soldiers and civilians, under the Tudors and Stuarts, was one of the causes which led to the rupture between the Crown and Parliament in the reign of Charles I. Accordingly, one of the grievances recited in the Petition of Right, 1628, was the issue of commissions to try persons, whether soldiers or not, "according to the justice of martial law . . . as is used by armies in time of war," instead of by the process of the ordinary Courts. This did not, of course, interfere with martial law during war or rebellion, and both Charles I. in 1638—39 and James II. in 1685 resorted to it (*n*), but in both cases it was recognised that, the crises of rebellion over, capital punishment could not be inflicted. On the Revolution of 1688 the issue of commissions of martial law in time of peace was recognised to be illegal and the first Annual Mutiny Act was passed in 1689 (*o*), establishing the army on a legal footing, and providing for its discipline. This Act, after reciting the provisions of Magna Carta, that no man should be punished or judged otherwise than by the established laws of the realm, but that it was requisite to retain such forces as should be raised to exact discipline, enacted that all officers and soldiers found guilty by court-martial of mutiny, sedition, or desertion, should be punished by death or as such court-martial should direct.

This Act (*p*) covered merely troops within the Kingdom in time of peace, leaving to the prerogative the power to lay down articles of war and erect Courts (1) for troops everywhere in time of war, and (2) for forces outside the dominions even in peace. In minor matters discipline continued even in the Kingdom to be regulated by prerogative (*q*). But in 1717 (*r*) statutory power was given to issue Articles of War and establish Courts in peace for all troops within the dominions, leaving untouched the prerogative in war. In 1803 (*s*) the statutory power was applied to troops without the dominions, but the Crown was still left to prescribe the statutory regulations without criticism by Parliament. In 1879 the provisions of the Mutiny Act and the Articles of War were consolidated in the Army Discipline and Regulation Act of that year. This Act was repealed and its provisions re-enacted in an amended form by the Army Act, 1881 (*t*), which, like the Act of 1879, must be re-enacted

(*m*) See Adye on Courts Martial, p. 3. The office of earl marshal continued to exist, and is hereditary in the Duke of Norfolk's family (*ib.*). The Court in fact seems to have continued in being for civil matters until declared not properly constituted without the constable; thus the sinking into the modern College of Arms: *Chambers v. Jennings* (1702), 7 Mod. Rep. 125. Under Elizabeth and Charles I. provost marshals were appointed to punish rioters by martial law.

(*n*) Clode, i, 425—441, 475—478.

(*o*) 1 Will. & Mar. c. 5. Cf. *Grant v. Gould* (1792), 2 H. Bl. 98.

(*p*) It was rendered more precise by 1 Will. & Mar. sess. 2, c. 4.

(*q*) Clode, i, 146.

(*r*) 3 Geo. I. c. 2. Ireland was excluded from 1782 to 1801, as it was then independent.

(*s*) 43 Geo. III. c. 20.

(*t*) 44 & 45 Vict. c. 58. The power to issue Articles of War and to make Rules of Procedure is given by ss. 69, 70, of the Army Act and is strictly subordinated to the Act. This principle was laid down by the Law Officers in 1728; Clode, i, 511, 512. The view of Maitland (Const. Hist., p. 450) that there still exists a royal prerogative

by the Annual Act, known as the Army and Air Force (Annual) Act, which also regulates the number of the troops to be maintained. The Army Act, 1881, and various amending Acts, with the King's Regulations and Army Orders made by statutory authority, form the present code of military law. An edition of the Manual of Military Law was issued in 1929.

**General Features of Military Law.**—The following points may be noted with regard to the constitution and jurisdiction of the military Courts:—

- (1) Certain purely military offences are created by the Act of 1881 which are cognisable only by courts-martial, and these offences come under such general headings as—Offences in respect of military service; Mutiny and insubordination; Desertion, fraudulent enlistment, and absence without leave; Disgraceful conduct; Drunkenness; Offences in relation to prisoners, to property, to courts-martial, billeting, impressment of carriages, enlistment, traitorous words, ill-treatment of soldiers, &c.
- (2) All offences against the ordinary law are triable by court-martial, except that (i) treason, murder, manslaughter, treason, felony, and rape, if committed in the United Kingdom, are not triable by court-martial, but by the competent civil Court (*u*); (ii) the same offences, if committed in any place within His Majesty's dominions other than the United Kingdom or Gibraltar, are not triable by court-martial unless committed whilst on active service, or unless the place where the offence was committed is more than one hundred miles in a straight line from any city or town in which the offender might be tried by a competent civil Court (*x*).
- (3) Any person subject to military law when in the King's dominions may be tried by any competent civil Court for offences for which he would be liable if he were not subject to military law (*y*). But soldiers of the regular forces are exempt from civil process, except (i) on account of a charge of or conviction for felony or misdemeanour or other offence punishable with fine or imprisonment; (ii) on account of any debt, damages, or sum of money exceeding £30. But where the debt or damage is less than £30, after due notice in writing given to the soldier or left at his last quarters, the creditor may proceed to judgment in his suit or action, and have execution other than against the person, pay, arms, ammunition,

to make articles of war must be deemed invalidated by *Att.-Gen. v. De Keyser's Royal Hotel*, [1920] A. C. 508. The Crown, of course, in virtue of the executive authority, can regulate matters other than those in respect of which it has statutory powers.

(*u*) Army Act, s. 41. If thought desirable, the Secretary of State can secure an early trial before the Central Criminal Court of persons subject to military law, accused of murder or manslaughter under the Jurisdiction in Homicides Act, 1862 (25 & 26 Vict. c. 65).

(*x*) *Ib.*

(*y*) *Ib.* s. 41A.

equipments, regimental necessities, or clothing of such soldier (z).

In the case of soldiers on active service in China, Kashgar, Bahrein, Maskat, Kuwait, and Spanish Morocco the jurisdiction of civil Courts, in respect of any charge for which trial is permitted by military law, is permitted only with the written consent of the commanding officer (a).

- (4) The courts-martial, the constitution and proceedings of which are regulated by the Act are either general, district, or field general courts-martial. A general court-martial has unlimited jurisdiction. A district court-martial may not try an officer nor award the punishment of death or penal servitude, but otherwise has jurisdiction similar to that of a general court-martial; it is composed of not less than three officers, a general court-martial of not less than five. A field general court-martial may be convened on active service or on service overseas, where it is not practicable to have a general court-martial, and should not be of less than three officers. The members are judges of fact and of law; a sentence of death must be concurred in by two-thirds of a general court-martial and all the members of a field general court-martial. The presiding officer has a casting vote, but not on the finding of the Court on any charge or on sentence of death. The accused may challenge members for cause (b). The sentences passed by such courts-martial must be confirmed by the officer appointed under the terms of the Act, but in cases of acquittal no confirmation is needed, and the accused must forthwith be released. The confirming officer may send back the finding and sentence once for revision (c), or refer it to any superior authority competent to confirm, or he may mitigate, remit, commute, or suspend the sentence. But in no case may he recommend the increase of a sentence (d), unless it is totally illegal, when it is a mere nullity.
- (5) In addition to the jurisdiction of the courts-martial, the commanding officer has jurisdiction to try offences by soldiers under the Act in a summary way (e). Offences by officers below the rank of field officers and warrant officers may be dealt with summarily by a general officer or colonel commandant (f). In either case only minor punishments can be inflicted, and the accused in any matter of importance, including any forfeiture of pay, must be given the choice of trial by court-martial.
- (6) The rules of evidence in trials by courts-martial are the same as those in use in civil Courts (g), and with regard to the

(z) Army Act, s. 144. For exception of seamen, see Naval Discipline Act, ss. 97, 98.

(a) Order in Council, April 22, 1927 (No. 359), under 53 & 54 Vict. c. 37.

(b) Army Act, ss. 48—51.

(c) *Ib.* s. 54. In case of revision no new evidence may be taken (*ib.*).

(d) *Ib.* ss. 54, 57.

(e) *Ib.* s. 46.

(f) *Ib.* s. 47.

(g) *Ib.* s. 128.

- conduct of proceedings and the reception and rejection of evidence, courts-martial are subject only to such laws as may be made by the Parliament of the United Kingdom (*h*).
- (7) At a trial by court-martial counsel may appear both for the prosecution and defence, and are subject to the same rules for contempt as in the High Court (*i*).
  - (8) A person, though sentenced or acquitted by court-martial, may afterwards (in cases triable by a civil Court) be tried by a civil Court, but any military punishment he may have already received must be taken into consideration in awarding punishment (*k*).
  - (9) A person acquitted by a civil Court of competent jurisdiction is not liable to be tried by court-martial on the same charge (*l*).
  - (10) The Crown is empowered to make Articles of War for the better government of officers and soldiers, and these are to be taken notice of judicially in all the Courts (*m*). But no such Articles are at present in force.
  - (11) Assignments of, or charges on, their pay or pension made by officers or soldiers are void unless made in pursuance of a royal warrant or by statutory authority (*n*).
  - (12) Officers and soldiers when on duty or on the march are exempt from tolls (*o*).
  - (13) All soldiers are exempt from serving on juries (*p*).
  - (14) Officers and soldiers have the right of voting for Members of Parliament; soldiers were, however, subject to certain statutory regulations with regard to remaining in barracks during Parliamentary elections except for the purpose of their military duties, or for giving their votes (*q*). Officers of any defence force (*e.g.*, admirals) on half-pay or retired pay may sit as members, and a commission in reserve or territorial forces is no barrier. The Act of Anne (6 Anne c. 41, s. 27) exempted military and naval officers from disqualification, and during the Great War officers sometimes spoke when on leave.
  - (15) An officer on the active list may not be appointed sheriff, nor until 1936 could he be mayor or alderman or hold any post in any municipal corporation (*r*). Officers are not, however, disqualified from being county councillors (*s*).

(*h*) *Ib.* s. 127. See the Rules of Procedure, 1926, made under the authority of s. 70 (S. R. & O., 1926 (No. 989), p. 112).

(*i*) *Ib.* s. 129. If the trial is in a Dominion the local law applies.

(*k*) *Ib.* s. 162 (1), (2).

(*l*) Army Act, s. 162 (6).

(*m*) *Ib.* s. 69.

(*n*) *Ib.* s. 141. For penal deductions, see ss. 137, 138. For deductions from men in the navy, see Naval Discipline Act, s. 97 A.

(*o*) Army Act, s. 143.

(*p*) *Ib.* s. 147.

(*q*) See 10 & 11 Vict. c. 21; 26 & 27 Vict. c. 12. The rule was laid down by William III. in 1689 and made statutory by 8 Geo. II. c. 30; Clode, i. 198—203, but repealed by 9 & 10 Geo. V. c. 10.

(*r*) Army Act, s. 146; 52 Vict. c. 3, s. 6; 26 Geo. V. & 1 Edw. VII. c. 14, s. 5.

(*s*) 54 & 55 Vict. c. 5, s. 8; 26 Geo. V. & 1 Edw. VIII. c. 14, s. 5. The privilege of making wills on active service without the formalities of the Wills Act, 1837, is granted even to minors; 7 & 8 Geo. V. c. 58.

**The Judge Advocate General.**—The judge advocate general is now a civil servant, though prior to 1892 the office was political (*t*). With the aid of his legal and military staff he examines the proceedings of all courts-martial held in the United Kingdom and advises as to the confirmation of findings and sentences. He reviews and advises also in cases of sentences of death or penal servitude or of dismissal passed by courts-martial outside the United Kingdom save in India, and any confirming officer outside the United Kingdom may send proceedings for review. After confirmation it is still open for the person concerned to petition against condemnation or sentence, under King's Regulations (1935, No. 682).

**Judge Advocates.**—At all general courts-martial the convening officer must, and at district courts-martial he may, if he chooses, summon a judge advocate to attend the proceedings, and these judge advocates are such persons as are appointed either by commission under the sign manual or as deputies (permanent or special) by the judge advocate general acting under his letters patent, or by the convening officer himself, where he is empowered to do so by the terms of his warrant. There are now three deputy judge advocates.

Formerly the officiating judge advocate acted as prosecutor, but this practice was discontinued in 1860. Generally speaking, his duties are to act as adviser to the Court on all questions of law, procedure, evidence, &c., and to make a record of the proceedings and forward the same to the judge advocate general's department.

(*t*) Before the creation of the office of Commander-in-Chief (1793) he was secretary and legal adviser to the Board of General Officers which controlled for the King army administration; in 1806 he became a minor minister responsible to Parliament. In 1892 the office ceased to be political and was given to the President of the Probate, Divorce and Admiralty Division of the High Court; in 1905 a distinct office was created, held on civil service conditions. It has a deputy.

## CHAPTER IV.

## THE ROYAL AIR FORCE.

**Constitution of Air Force.**—This force is recruited by voluntary enlistment and is administered by the Air Ministry. The Air Ministry was established in 1918 to take over the control of the Royal Air Force, which was formed by the amalgamation of the Royal Naval Air Service and the Royal Flying Corps. The Air Force Constitution Act, 1917 (7 & 8 Geo. V. c. 51), provides for the establishment, administration, and discipline of an Air Force and the establishment of an Air Council, and this came into being on January 3, 1918. The Air Council consists of the Secretary of State for Air and other members; its present constitution is given above (a). Except that the Air Force is controlled by the Air Ministry and not by the War Office, it is regulated in precisely the same way as the Army. The Act of 1917 authorised the adaptation of the Army Act to the Air Force, and the Air Force Act is given each year continued existence, as in the case of the Army Act, by the Army and Air Force (Annual) Act. Further authority is given to the Secretary of State by the Air Navigation Act, 1936 (b), which transfers to him from the Air Council the powers given by the Air Navigation Act, 1920 (c). The Manual of Military Law has been remodelled into a Manual of Air Force Law, 1933, and there are issued King's Regulations and Air Council Instructions for the Royal Air Force. Rules of Procedure (Air Force), 1933, are based on the corresponding Rules for the Army, and the Air Force in China and other places enjoys the immunity from local civil jurisdiction accorded to other armed forces by the Order in Council of 1927 (d). By the Auxiliary Air Force and Air Force Reserve Act, 1924 (e), power was given to the Air Ministry, in addition to that of the Act of 1917, to raise and maintain an Air Force Reserve corresponding to the Army Reserve and an Auxiliary Air Force corresponding to the Territorial Army. The Reserve Forces Act, 1882 (f), and the Territorial and Reserve Forces Act, 1907 (g), were adapted to the Air Force by Orders in Council, October 9, 1924 (h). Further power, as to the length of service of pilots and observers, when being trained and when qualified, was conferred by the Air Force Reserve (Pilots and Observers) Act, 1934 (i), and executed by Order in Council, June 29, 1934.

(a) P. 180, *ante*.(b) 26 Geo. V. & 1 Edw. VIII. c. 44, s. 24. See p. 180, *ante*.

(c) 10 &amp; 11 Geo. V. c. 81.

(d) See p. 374, *ante*.

(e) 14 &amp; 15 Geo. V. c. 17.

(f) 45 &amp; 46 Vict. c. 48.

(g) 7 Edw. VII. c. 9.

(h) Auxiliary Air Force Orders, October 9, 1924 (S. R. &amp; O., 1924, No. 1212, p. 11); May 2, 1925 (No. 415, p. 2); November 3, 1927 (No. 1081, p. 2). Air Force Reserve Orders, October 9, 1924 (No. 1213, p. 31).

(i) 24 &amp; 25 Geo. V. c. 5; S. R. &amp; O., 1934, No. 692, i, 121.

**The Existing Forces.**—The legal and constitutional questions affecting the military forces arise also in the case of the Air Force, and are subjected to the same principles. British policy as to the Air Force was long dominated by considerations of reducing international armaments and abolishing, save for police purposes, bombing; hence, in 1933, the Home Defence Force comprised only forty-two squadrons (thirteen non-regular) of the fifty-two projected in 1923, and the total force was seventy-five and a half regular squadrons, including the equivalent of thirteen and a half squadrons in the Fleet Air Arm, the cost being estimated at £17,246,000. But for 1938–39 the cost was set down at £102,720,000, of which £30,000,000 was borrowed. On July 20, 1938, a supplementary estimate of £22,901,000 was submitted, all but £1,000 to be borrowed. The strength in men of the Air Force was to be raised to 96,000 from 83,000; the Air Force Reserve was to advance to 50,000 from 31,000, and the Auxiliary Air Force from 9,500 to 11,500. On April 1, 1938, there were 123 squadrons at home, the equivalent of twenty squadrons serving with the Fleet Air Arm, and twenty-six overseas, and an increase by April 1, 1939, to 1,750 first line aircraft was promised. By March, 1940, 2,370 for the metropolitan air force, and 490 for overseas were anticipated.

The Royal Air Force recruits officers either permanently or on short-term commissions at various ages, and a large number of different classes of men on like conditions (*k*). The recent additions to the force include (1) the Royal Air Force Volunteer Reserve (entry at 18–25), which is regularly given training in flying in the pilot section, and other sections are being formed; (2) the R.A.F. Civilian Wireless Reserve (age 18–55); (3) the R.A.F. Officers' Emergency Reserve, available in emergency for administration and special duties; (4) the R.A.F. Reserve Class E, composed of former men of the R.A.F.; (5) the Auxiliary Air Force with flying and balloon squadrons, regularly trained; (6) the Civil Air Guard, composed of units attached to Light Aeroplane Clubs under the administration of the Commissioners of the Civil Air Guard; the members (age 18–50) undertake to serve in emergency and in return are trained at low cost in flying; and (7) for Women the Auxiliary Territorial Service open to women from 18 to 23.

**Fleet Air Arm.**—Under a decision announced on July 30, 1937, the Admiralty is given full administrative as well as operational control of the Fleet Air Arm, the Air Force continuing to control shore-based aircraft for naval co-operation. The number of aircraft announced to be ready in April, 1940, was about 500 (*l*).

**Civil Aviation.**—The report of the Cadman Committee of Inquiry into Civil Aviation (*m*) revealed in 1938 a serious lack of organisation in the Air Ministry which led to reorganisation. At the same time the subsidy for civil aviation grants was raised from £1,500,000 to £3,000,000 (*n*).

(*k*) The short service commissions are for four years followed by six in the reserve, or *vice versa*. (*l*) Earl Winterton, House of Commons, May 12, 1938.

(*m*) Parl. Pap., Cmd. 5685 (1938); Mr. Chamberlain, House of Commons, March 16, 1938.

(*n*) Air Navigation (Financial Provisions) Act, 1938 (1 & 2 Geo. VI. c. 33).

## PART VI.

## Control of Revenue and Expenditure.

## CHAPTER I.

## THE REVENUE.

**Control and Sources of Revenue.**—The present complete control over revenue and expenditure exercised by the Executive rests upon and is regulated essentially by statute, replacing the powers under the prerogative formerly vested in the Crown. The Crown at first had prerogative authority to raise certain funds, and full right to use them. At first the Crown revenues might suffice, but it soon became necessary to supplement them by legislative grant. The Crown in fact had parted with its powers of increasing at pleasure its revenues by surrendering the right to tallage the tenants on royal demesne (1340) and by agreeing, in 1275, to limit the customs on wool and leather. But it was not until the Restoration that Parliament began to insist on control of the sums it granted, from the time of George III. the distinction between the Civil List and public expenditure proper became clear, and a complete system of control was laid down, culminating in the legislation of 1866 (a). A further change of great importance concerns revenue collection. The process of farming out of sources of revenue has been superseded entirely, and revenues are now collected by commissioners under statutory regulation of the Taxes Management Act, 1880.

In 1937—38 the total revenue reached £875,718,000, derived from customs (£221,561,000), excise (£113,700,000), income tax (£297,986,000), surtax (£57,060,000), estate duties (£88,980,000), stamps (£24,170,000), excess profits duty and corporation profits tax (£823,000), land tax and mineral rights duty (£815,000), motor vehicle duties (£34,608,000), Post Office (net receipts) (£13,700,000) and Post Office Fund (£825,000), Crown lands (£1,330,000), receipts from sundry loans (£5,230,000), and miscellaneous receipts (£13,510,000).

*Crown Land and the Hereditary Revenues of the Crown.*

**Sources of Crown Revenue.**—The ancient hereditary revenues of the Crown are derived principally from such lands, or interests in land, as have, or may, become vested in the Sovereign in his body.

(a) See p. 395, *post*.

politic in right of the Crown (b). In addition to these are the revenues derived from prerogative rights relating to property; such are the right to *bona vacantia* (including waifs (c), wrecks (d), estrays (e) and treasure trove (f)), and to certain fisheries, royal fish, and swans; the revenues derived from *droits of Admiralty* and the Courts of Justice, and from fines, recognisances, legal fees and forfeitures (g). Besides these there were formerly certain revenues derived from prerogative rights relating to the Church, such as the temporalities of bishoprics during vacancy, corodies, firstfruits, and tenths, which have been diverted to other uses, or, in the case of corodies, fallen into disuse (h), together with certain revenues derived from taxation which were settled upon the Crown by statute, and have now been surrendered to the nation along with the other hereditary revenues in the manner presently mentioned, and are either paid into the Consolidated Fund, or have ceased to be chargeable. These were the revenues derived from the Post Office, which are now paid into the

(b) These comprise the ancient demesne lands of the Crown, and lands coming to it afterwards by virtue of the prerogative, such as the foreshore, lands formed by alluvion, or diluvion, or the right to royal mines, or lands acquired by escheat or forfeiture. (See 1 Bl. Com., 14th ed., 286.) To these the Petroleum (Production) Act, 1934 (24 & 25 Geo. V. c. 36), s. 1, adds property in petroleum and natural gas, whence, it may be, substantial revenue will arise.

(c) These were goods thrown away by a thief in flight, confiscated as punishment for non-prosecution of the thief, but not in the case of a foreign merchant. The owner may recover by securing a conviction: *Fozley's Case* (1600), 5 Co. Rep. 109 a.

(d) Owners of ship, goods and cargo can reclaim in a year; thereafter the proceeds in the hands of the receivers of wreck pass, subject to salvage expenses, to the Consolidated Fund. See Merchant Shipping Act, 1894, ss. 510—537. Cf. *Wells v. Gas Float Whiffon* (No. 2), [1897] A. C. 337. Airships fall under the same rule. See S. R. & O., 1938, No. 136.

(e) Beasts of value of unknown ownership wandering at large in the precincts of a manor; the Crown can claim after a year and a day. Prior to this the owner can recover on payment of costs. Normally, by grant or prescription, they fall to the lord of the manor. Cf. *Anon.* (1612), 12 Co. Rep. 101.

(f) *Vetus depositio pecunie*; if there is no deposit it is not treasure trove; the issue is decided by coroner and jury. Concealment is a misdemeanour. It is usual now to pay part or whole of the value to the finder, if the articles are considered suitable to retain; if not, they are handed back. See *Att.-Gen. v. British Museum*, [1903] 2 Ch. 598; *Att.-Gen. v. Moore*, [1893] 1 Ch. 676; *R. v. Thomas* (1863), Le. & Ca. 313; G. F. Hill, *Treasure Trove*.

(g) Forfeitures on conviction for treason or felony disappeared under the Forfeiture Act, 1870 (33 & 34 Vict. c. 23).

(h) The temporalities of bishoprics on avoidances are now paid to the Ecclesiastical Commissioners, and the bishop receives a fixed income in lieu of the former revenues. (See the Ecclesiastical Commissioners Act, 1860 (23 & 24 Vict. c. 124, s. 1.) A *corody* was the right to send a chaplain to be maintained by the bishop, or to have a pension allowed him until the bishop promoted him to a benefice; this has apparently fallen into disuse. (See 1 Bl. Com., 14th ed., 283.) *Firstfruits* consist of the first year's whole profits of a benefice, and *tenths* of the tenth part of the annual revenues and profits. They were first introduced into England, it seems, by Pandolph, the Pope's legate, in the reigns of John and Henry III. (See 26 Hen. VIII. c. 3, s. 29; *Rochester (Bishop) v. Le Fanu*, [1906] 2 Ch. 513, 519.) They were made payable to the Crown out of all livings, and enforceable by writ of extent. (See stats. 26 Hen. VIII. c. 3; 33 Hen. VIII. c. 39, s. 55.) They were resigned by Anne to trustees to form the fund called Queen Anne's Bounty. (See 2 & 3 Anne, c. 20.) They were on the basis of an old valuation rated under statute at £1 and 17s. 6d. for every £100 of the annual value, and paid to the Governors of Queen Anne's Bounty, to form a fund for the augmentation of poor livings. (See the Ecclesiastical Commissioners Act, 1836, 6 & 7 Will. IV. c. 77; O. in C., November 27, 1852; *Rochester (Bishop) v. Le Fanu*, *supra*, at p. 520.) Most have now been extinguished or can be redeemed: First Fruits and Tenths Measure, 1926, No. 5.

Consolidated Fund; the hereditary excise on beer, ale, and cider, now no longer chargeable (*i*), and certain duties derived from wine licences, and the West India duties, now repealed.

After the Revolution of 1688, and the accession of William III., the hereditary revenues continued to be settled upon the Crown by statute until the accession of George III., the principle of contribution to the national revenue being preserved in the preamble to the Acts (*k*). Thus, in 1689, the Crown was granted £600,000, including the hereditary revenue, to include salaries of foreign ministers, judges and civil service, and pensions. George II. was guaranteed £800,000 a year, if the revenues already assigned should fall short.

**Transfer to Nation.**—Since the accession of George III., in 1760 (*l*), it has been customary for succeeding Sovereigns to surrender the hereditary revenues to the nation, to be paid into the Consolidated Fund, in return for a fixed income known as the Civil List (*m*), the statutes by which this is effected, termed Civil List Acts, containing a clause preserving the rights of the Crown to the hereditary revenues, and being made to take effect for the life of the reigning Sovereign and six months after.

As a result of the various surrenders which are cumulative in effect (*n*), the whole of the hereditary revenues in England, Scotland, and Northern Ireland (including the revenues of the Osborne Estate (*o*), but not those of the Duchies of Lancaster and Cornwall, and the

(*i*) The hereditary excise and a duty on wine licences were settled upon the Crown by statute for ever in 1660 in place of the revenues arising from military tenures, which were abolished by the Act 12 Car. II. c. 24 (ss. 15—27). They are now no longer chargeable (Civil List Act, 1901 (1 Edw. VII. c. 4), s. 9 (3)). The revenues surrendered included reliefs, escheats, the profits of wardship and marriage, the right to an aid, and purveyance and pre-emption, which had been oppressively exercised. Under James I. proposals to commute failed; Tanner, Tudor Const. Doc., pp. 598, 599; Const. Doc. of James I., pp. 345—354.

(*k*) See the preambles to the Crown Lands Act, 1702, 1 Anne, c. 1; and the statutes 1 Geo. I. st. 1, c. 1; 1 Geo. II. st. 2, c. 1.

(*l*) See 1 Geo. III. c. 1.

(*m*) So called because the salaries of certain public officers and the Civil Service were originally charged upon it. See 1 Geo. III. c. 1, s. 6.

(*n*) George III. surrendered the whole of the hereditary revenues (except those of Scotland and Ireland, and the Duchies of Lancaster and Cornwall) in return for an annuity of £800,000, upon which certain salaries were charged, by statute 1 Geo. III. c. 1. The Irish revenues were surrendered by an Irish Act later in the same reign, 32 Geo. III. c. 1 (Irish). A similar arrangement was made by George IV. (see 1 Geo. IV. c. 1, and 2 Geo. IV. c. 31) and by William IV., who surrendered in addition the revenues of Scotland (except the principality), the droits of the Crown and Admiralty, other casual revenues, and the West India duties, since repealed; he was freed from all public charges save £23,000 secret service money, but on his list of £510,000 rested a pension list of £75,000; Queen Victoria made the same surrender, receiving an income of £385,000, but this was cleared of pensions. The Crown was authorised to grant £1,200 a year in new pensions to meritorious persons; the distribution is decided by the Prime Minister (see the Civil List Act, 1837, 1 & 2 Vict. c. 2). These pensions are not paid from the present Civil List, but the title remains. Efforts to secure the increase of the small sum were long negated, apparently on the ground that there are few deserving persons needing them. The succeeding Acts are the 1 Edw. VII. c. 4, the Civil List Act, 1910, and 1 Edw. VIII. & 1 Geo. VI. c. 32, superseding the Civil List for Edward VIII. (c. 15), the first of these providing that the hereditary excise duties should cease to be chargeable. On the misuse of pensions, see May, Const. Hist., i, 172—176; the civil list, 155—172.

(*o*) This was presented to the nation by King Edward VII. as a memorial to the late Queen. See 2 Edw. VII. c. 37.

Principality of Scotland, which are retained by the Crown for its private use (or, in the case of the Duchy of Cornwall, for the use of the Heir Apparent)), together with the surplus revenues of Gibraltar, or any other possession of the Crown out of the United Kingdom, and all casual revenues at home and abroad, are to be paid into the Consolidated Fund during the present reign and six months after (*p*). The colonial revenues in fact are always expended locally under authority of an Act of 1852 (*q*). In return for this surrender, provision is made for the King and certain other members of the Royal Family in the manner mentioned (*r*). The Crown Lands yielded £1,330,000 in 1937—38, but, when it is argued that the nation makes a good bargain, the answer is that the sound management which produces the revenues and the national expansion which aids the revenues, have nothing to do with the King.

**Control and Management.**—The control and management of the Crown lands is regulated by 10 Geo. IV. c. 50, and various amending Acts, which may be cited together as the Crown Lands Acts, 1829 to 1927. By the Act of 1927 (*s*) the Commissioners of Crown Lands were incorporated and were empowered to exercise all the powers which before the Act were exercised by the Commissioners of Crown Lands—as the former Commissioners of Woods were styled from December 31, 1924—as well as the powers of sale, leasing, exchange, &c. conferred by the Act. Power to hand over functions in respect of woods and forests to the Forestry Commissioners has been given and exercised (*t*). The Commissioners are bound to exercise due regard both to the interests of the nation and to those of the Crown, to which in theory the capital reverts six months after the death of the reigning Sovereign.

### *The Customs.*

**History of Customs.**—The origin of the customs is obscure; it may be found in the early Norman period, when it became customary for merchants to pay tolls to the King on all merchandise imported or exported as a sort of passport or safe conduct for themselves and their goods, which were chiefly wine by way of import, and wool, woolfells, and leather by way of export. The claim of the Crown could be based also on its control of foreign relations (*u*). The toll on wine, which was the principal import, was termed *prisage*, or *butlerage*, and later on *tunnage*, and consisted in the right to take one tun from every cargo of ten tuns, and two tuns from every cargo of twenty tuns (*x*).

(*p*) Civil List Act, 1937 (1 Edw. VIII. & 1 Geo. VI. c. 32).

(*q*) 15 & 16 Vict. c. 39.

(*s*) 17 & 18 Geo. V. c. 23.

(*t*) 13 & 14 Geo. V. c. 21; Orders in Council, March 21, 1924; June 1, 1926 (S. R. & O., 1924, No. 386, p. 454; 1926, No. 677, p. 593).

(*u*) *Bates's Case* (1606), 2 St. Tr. 371. On another view (H. Hall, *Customs Revenues of England*, i, 58 ff.), it is an aspect of the royal right of purveyance.

(*x*) See Dowell, *Hist. of Taxation*, i, 83. See also N. S. B. Gras, *Early English Customs System* (1918). Wilkinson, *Const. Hist. of 13th and 14th Centuries*, pp. 55 ff., where the constitutional significance of the struggle is reconsidered. It is clear that the merchants were held to be more concerned in the grants than the Commons as such.

(*r*) See p. 130, *ante*.

The amount of these tolls became fixed in course of time, and they were termed *consuetudines*, or *customs*, and Magna Carta (c. 41) expressly forbade the exaction of unjust tolls, or any except the ancient and just *consuetudines*. But irregularities continued, as can be seen from the Petition of the Barons (1258). In 1275, at the instance of the merchants, Parliament granted to Edward I. certain duties on wool, woolfells, and leather exported from England and Wales, and these duties became known subsequently as the *ancient customs* (*antiqua custuma*) (y), and by the Confirmatio Cartarum (1297) he surrendered the right to levy any further custom duty without consent, which by statutes of 1340 must be given in Parliament, not by private bargain. In 1303 Edward I. came to an agreement with the foreign merchants by which they agreed to pay two shillings for every tun of wine instead of the old prisage, and certain additional duties on wool, woolfells, leather and cloth, and a poundage of three-pence on all other goods imported or exported. These duties became known as the *nova sive parva custuma*, as opposed to the *antiqua sive magna custuma* kind. Suspended by the Ordainers, it was restored by Edward II. in 1323 and given statutory validity in 1353. An effort was made in 1371 (z) to secure Parliamentary control over both the wool duty and tunnage and poundage, but this did not settle the issue, because, while the rates of tunnage and poundage were fixed at 2s. and 6d., further increase was not specifically forbidden. Additional duties under the name of subsidies of tunnage and poundage were granted to Richard II. in 1397 for life, and these life grants became more or less customary in subsequent reigns.

All the Tudor monarchs received life grants of tunnage and poundage, and under Mary (*circa* 1558) the "Book of Rates" was adopted, which specified values at which goods were to be rated in lieu of the old system of accepting the merchants' valuation. Under Elizabeth, who, like her predecessor, put duties on cloth and sweet wines, a new book of rates was introduced, and was continued in use when the customs duties, or subsidies of tunnage and poundage as they were called, were granted to James I. for life (a). The claims of James I. as to prerogative power, as has been seen, were upheld by the Court of Exchequer (b).

On the accession of Charles I., Parliament did not follow the practice of granting the customs for the life of the Sovereign and proposed to limit the grant to one year. Charles, however, proceeded to levy the tax under Order of the Council by Royal Warrant, and continued to levy it during the period 1629—1640, in which he reigned without a Parliament. On re-assembling in 1641, the Long Parliament granted the customs for two months (c), and this grant was subsequently continued (d).

After the Restoration in 1660, an Act called the Great Statute (e), granted the customs to Charles II. for life, and established a new book

(y) See Dowell, Hist. of Taxation, i, 85.

(a) 1 Jac. I. c. 33.

(c) 16 Car. I. c. 8.

(e) 12 Car. II. c. 4.

(z) 45 Edw. III. c. 4.

(b) See p. 202, *ante*.

(d) *Ib.* c. 36.

of rates, classifying the charges as (1) tonnage on wine; (2) poundage on imported goods; (3) poundage on exported goods; (4) the duty on woollen cloth (repealed in 1700). James II., on his accession, imprudently levied the customs by proclamation before they had been granted by Parliament. The regular Parliamentary grant for life was, however, made shortly after (*f*).

After the Revolution of 1688, Parliament showed their intention of keeping the revenue in their own hands by granting the customs duties for four years only (*g*); but a few years later a new subsidy of customs was granted to the King for life (*h*).

The subsequent history of the customs is one of increasing taxations to meet the increased expenditure of 130 years of war, and to protect trade. In 1815, at the termination of the war with France, every conceivable article was subject to taxation.

In 1842 Peel effected the first great revision of the tariff, which then comprised some 1,200 dutiable articles. His reforms affected some 750 articles. In 1845 he made a second revision, when some 450 articles were entirely removed, and again in 1846. As a result of Mr. Gladstone's revision in 1853, some forty-eight dutiable articles only were left (*i*).

**Present State of Customs.**—The principle of further reductions continued, the duties on corn of all descriptions being repealed in 1869 (*k*). The tariff up to 1931, which depended on the Customs Duties Consolidation Act, 1876 (*l*), with the modifications made by various Customs and Inland Revenue Acts and Finance Acts, comprised only some twenty dutiable articles, the chief revenue-bearing items, of which were beer, wines, spirits, tobacco, sugar, tea, coffee, cocoa, currants, and plums. The principle was revenue only, not protection; duties were not placed in the main on raw materials, and, where dutiable goods were produced at home, *e.g.*, spirits, beer, cards, an excise duty was levied. In certain cases important industries (*e.g.*, dyestuffs) were protected (*m*); but it was only in 1931–33 that a full system of protection with Imperial preference became effective (*n*). The most interesting feature of the system is the rule that applications for new duties, variations, &c., are referred to an Advisory Committee of not less than three—the number in practice—nor more than six members appointed by the Treasury. On its recommendation duties may be imposed by the Treasury, but cannot stand unless approved by resolution of the Commons within twenty-eight days. The Board of Trade may also impose duties in case of discrimination, subject to like confirmation (*o*). Special power was also given as regards discriminatory duties against Irish Free State imports in view of the Irish failure to meet debts due to the United Kingdom (*p*), and in

(*f*) 1 Jac. II. c. 1.

(*h*) 9 & 10 Will. III. c. 23.

(*i*) See the Tariff Act, 1860 (23 & 24 Vict. c. 110).

(*k*) 32 & 33 Vict. c. 14.

(*m*) See Safeguarding of Industries Act, 1921 (11 & 12 Geo. V. c. 47).

(*n*) Import Duties Act, 1932 (22 Geo. V. c. 8).

(*p*) Irish Free State (Special Duties) Act, 1932 (22 & 23 Geo. V. c. 30).

(*g*) 2 Will. & M. c. 4.

(*l*) 39 & 40 Vict. c. 35.

(*o*) *Ib.* ss. 3, 12, 19.

that case also Treasury action must be confirmed by resolution. The total received in 1937—38 was £4,182,011 from this source, and £29,712,341 from the Act of 1932.

**Collection of Customs.**—The collection of the customs was in early days farmed out to individuals, a system productive of many evils. At the end of the seventeenth century a board of commissioners was appointed to manage and control the customs, and the present Board of Commissioners is appointed by the Crown under the Act of 1876 (*q*). The Commissioners of Customs and Excise appoint officers for the management and collection of the customs, and are subject to the supervision of the Treasury Commissioners (*r*).

The punishment for customs offences is the infliction of a penalty, according to the nature of the offence, followed by imprisonment in default of payment. In the King's Bench Division proceedings are by arrest under *capias* granted on affidavit; bail must then be found; if not the prisoner is committed until trial. Alternatively summary procedure is now possible since 1853, the limit of imprisonment being six months.

### *The Excise.*

**History and Present State.**—Excise duties were first imposed by an ordinance of the Long Parliament in 1643 (*s*) on beer, ale, cider, perry, wine, and tobacco. From time to time various other articles were charged with excise duties, and after the Restoration they were granted to Charles II. for life (*t*). Nearly all the old excise duties have been remitted at various times, and the principal existing duties are those on beer, spirits, British wine, table waters, home-grown tobacco, and artificial silk.

The excise also includes the revenue derived from licences. These excise licences were originated in 1784, when they were charged upon the makers of and dealers in various exciseable articles (*u*), and they have since been extended to various trades, such as beer or spirit dealers, distillers, hawkers, house agents, moneylenders, pawnbrokers, tobacconists, and many others, and on such various subjects as dogs, armorial bearings, guns, game, patent medicines until 1939, men-servants—abolished in 1937—and carriages.

A third branch of excise is entertainments duty, a very substantial source, which gave £7,985,071 in 1935—36.

**Collection.**—The collection and management of the excise was formerly under the control of the Commissioners of Inland Revenue, and is, since April 1, 1909, under the control of the Commissioners of Customs and Excise.

### *Property and Income Tax.*

**Taxes on Personality.**—Taxation of personality was originated by Henry II. in 1188, with the consent of the Magnum Concilium, when

(*q*) 39 & 40 Vict. c. 36, s. 1.

(*s*) Scobell's Collection of Acts and Ordinances, p. 49.

(*t*) 12 Car. II. c. 23.

(*r*) *Ib.* s. 2.

(*u*) 24 Geo. III. c. 41.

he exacted the Saladin Tithe, assessed by local jurors. In 1193 a tax of one-fourth of the value of their personalty was exacted from every person in order to raise the sum required to ransom Richard I.

During the thirteenth, fourteenth and fifteenth centuries a tax on movables, consisting of a *tenth* and *fifteenth* part for the towns and shires respectively, was frequently granted by Parliament, and it took the place in part of the old scutage hidage, or tallage (*x*). Eventually, the grant of a tenth and fifteenth came to be understood as the grant of a fixed sum, based on a bargain made with the localities in 1334, amounting to some £39,000 (*x*). During the sixteenth century both tenths and fifteenths and a form of subsidy raised on land and personalty were in use. The latter came to be a tax on land of 4s. in the £ and 2s. 8d. on goods, but in 1601 Sir W. Raleigh asserted that estates were underrated a hundredfold, and the yield was only about £80,000. In the seventeenth century the grant of tenths and fifteenths became rarer, though an example occurs as late as 1623, when three entire subsidies and three tenths and fifteenths were granted by Parliament to James I. (*y*). The tax on personalty, in the form of subsidy in 1663, assessment to 1691, and land tax from 1691 (*z*) continued to be levied with the tax on realty until 1798, when the taxes on realty and personalty were directed to be levied separately (*a*). In the following year (1799) the first income tax was imposed by Pitt (*b*), and the old tax on personalty was finally abolished in 1833 (*c*).

**Forced Loans or Benevolences.**—Taxes on personalty were re-enforced by means of *forced loans* or, as Edward IV. more frankly styled them, *benevolences*. These were first levied by Richard II. from 1473 (*d*). They were declared illegal by Parliament in 1351 (*e*) and 1483 (*f*), but re-introduced by Henry VII. (*g*). Persons who objected to pay the loan were summoned before the Privy Council, and often subjected to fine and imprisonment by the Star Chamber. In 1615 Oliver St. John having objected that the exaction of the loan was contrary to Magna Carta, was sent to the Tower, and sentenced by the Star Chamber to pay a fine of £5,000, which, however, was afterwards remitted (*h*).

The exaction of a general loan by Charles I. in 1626 caused great discontent, and many persons were committed to prison for refusing to pay. Sir Thomas Darnel and four others, who had been so

(*x*) See p. 386, *post.*; Dowell, *Hist. of Taxation*, i, 193. (*y*) 21 Jac. I. c. 34.

(*z*) A poll tax first imposed in 1377, last in 1698, expired in 1706; a hearth tax of 2s. a hearth ran only from 1662 to 1689.

(*a*) 38 Geo. III. c. 60. A tax on offices ended in 1876.

(*b*) 39 Geo. III. cc. 13, 22.

(*c*) 3 & 4 Will. IV. c. 12.

(*d*) Rot. Parl. iii, 62.

(*e*) 25 Edw. III. st. 1, c. 6; recited in the Petition of Right (3 Car. I. c. 1).

(*f*) 1 Ric. III. c. 2.

(*g*) See Bacon, Henry VII., p. 93; 11 Hen. VII. c. 10, authorised collection of arrears of sums promised.

(*h*) Gardiner, *Hist. Eng.*, ii, 172. Sir W. Raleigh (Works, viii, 212 ff.) urged (1615) that Parliamentary sanction should be asked for. In 1622 Lord Saye and Sele was committed to the Fleet for opposing the benevolence then ordered, which raised £80,000.

committed under a warrant from the Privy Council, sued out their *habeas corpus* in the King's Bench; but it was held by Chief Justice Hyde that the King's Bench could not inquire into the grounds of the commitment, the warrant having been made "by special command of the King" (i). Forced loans and benevolences were finally declared illegal by the Petition of Right (3 Car. I. c. 1).

**The Income Tax.**—This tax, first imposed in 1799, was modified in 1803 and 1806; after Waterloo, it was abandoned. Revived in 1842, it has since become absolutely indispensable as the basis of revenue. It is levied under legislation consolidated in 1918 (k), but the actual imposition and rates are imposed annually as the vital element in the budget. The tax is levied under five schedules: (a) on ownership of land; (b) profits on land occupied for husbandry; (c) income from government stocks; (d) incomes from earnings generally, trades, professions, remittances from abroad, interest, &c.; (e) salaries and pensions of public servants in a wide sense of that term, including servants of public companies. As far as possible, the tax is collected at the source, *e.g.*, dividends are paid less tax. In most cases the income assessed is that of the year preceding that of assessment.

Generally speaking, the tax falls on (1) all income derived from any source in the United Kingdom irrespective of whether the persons who receive the income are residents, absentees, subjects, or aliens; (2) all income from outside the United Kingdom received by subjects or aliens therein resident in a technical sense (l). There are exemptions for the Crown and lands and buildings occupied by public servants for direct governmental purposes, as opposed to harbour boards (m). The King's private estates are statutorily liable (n). Property held in trust for charity, hospitals, public schools, and almshouses, friendly societies, savings banks, trade unions, universities, &c., are in certain cases exempt. The taxable limit is £125; £100 is allowed from all incomes of unmarried persons (£180 for a husband and wife); there are reductions for children, earned income (one-fifth up to a maximum of £300), &c., and a wife's income is aggregated with that of her husband, who alone is personally liable for payment.

Super tax, an extra impost on larger incomes, dates from 1910; in 1929—30 it was replaced by a like tax called surtax, which in effect is an additional income tax for the year preceding, payable on January 1, *i.e.*, that payable on January 1, 1939, is additional to the income tax of 1937—38. Ordinary income tax is payable on January 1 and July 1. The Commissioners of Inland Revenue fix the assessments to surtax.

(i) *Darnel's Case* (1628), 3 St. Tr. 1. See p. 202, *ante*.

(k) 8 & 9 Geo. V. c. 40.

(l) *Rogers v. Inland Revenue* (1879), 1 Tax Cas. 225; *Inland Revenue v. Lysaght*, [1928] A. C. 234; *Levene v. Inland Revenue*, [1928] A. C. 217.

(m) *Mersey Docks and Harbour Board v. Cameron* (1865), 11 H. L. Cas. 443.

(n) 25 & 26 Vict. c. 37, s. 8.

**Collection and Management.**—These matters are under the control of the Commissioners of Inland Revenue, under whom are General Commissioners, Special Commissioners, Surveyors of Taxes, and Assessors.

The various bodies of Commissioners act as quasi-judicial tribunals in settling contested assessments, and appeals on points of law raised before the General or Special Commissioners on special case, which must be stated by them on the demand of the appellant or the Surveyor of Taxes, go to the King's Bench Division, and thence to the Court of Appeal and House of Lords (*o*). The taxpayer has also a remedy in appropriate cases by *mandamus* and by Petition of Right under the Petitions of Right Act, 1860; a declaratory action against the Attorney-General has also been used in an analogous case (*p*). The collection of the tax is enforced by penalties and distraint (which takes precedence of landlord's claim for rent) and sale. If there is no sufficient distress, the defaulter can be committed to prison by the General Commissioners, until he gives bail or security to pay the tax and costs. The Commissioners have wide powers of compounding or staying proceedings, of remitting or modifying fines or penalties, and of releasing persons imprisoned, and the Treasury has power to mitigate or remit the fine or penalty before or after judgment.

By statute, even before the Act imposing the tax has been passed, the revenue authority can assess and demand payment of it (*q*). The same rule applies to duties of customs and excise, but the resolution in Committee of Ways and Means authorising the tax must be confirmed on report by the Commons within ten sitting days, the bill confirming read a second time within twenty sitting days, and assented to within four months from the date of the resolution.

### *The Land Tax.*

**History.**—The origin of the Land Tax is only to be found by going back to early feudal times. Danegeld, first imposed to buy off the Danes in 991, became obsolete in 1162, perhaps as essentially a war tax which popular sentiment disapproved in peace. Tenures by military service were commuted into money payments, scutage, in the reign of Henry II.; land generally was subjected to tax calculated on the hide or later the carucate of 100 acres, the towns also paying. These taxes are the scutage and aid of Magna Carta (c. 12), which were only to be raised with common consent. Even so, the towns in demesne could, on the plea of property rights of the Crown, still be tallaged by the King, for the last time in 1332, and a statute of 1340 (*r*)

(*o*) Income Tax Act, 1918 (8 & 9 Geo. V. c. 40), s. 149.

(*p*) *Dyson v. Att.-Gen.*, [1912] 1 Ch. 128.

(*q*) *Bowles v. Att.-Gen.*, [1913] 1 Ch. 57, negatived the right, but the matter was provided for by the Provisional Collection of Taxes Act, 1913 (3 & 4 Geo. V. c. 3).

(*r*) 14 Edw. III. st. 2, c. 1. The *statutum de tallagio non concedendo*, a petition of 1297 (Wilkinson, *Const. Hist.*, pp. 63 f.), seems not to have applied to tallage of demesne; at any rate, the King did not accept it and raised a tallage in 1304: Clarke, *Medieval Representation and Consent*, pp. 272 ff.; Pasquet, *H. of Commons*, pp. 109, 180, 181, 242. On scutage and the omission of cc. 12 and 14 from the re-issue of the Charter, see Pasquet, pp. 239—241.

forbade their levy without the assent of Parliament. These taxes became obsolescent in the fourteenth century, and were superseded by tenths and fifteenths (*s*), and these were at first augmented and later superseded by subsidies as above mentioned. Subsidies were continued under the Tudors and Stuarts, and were granted sometimes by fixed sums and sometimes by a general rate of 4*s.* and 2*s.* 8*d.* in the £. The Commonwealth continued to levy fixed sums by quotas from each county or borough, and these quotas were raised by a rate on an assessment of the annual values of the real and personal property in each parish or district, made by commissioners (*t*) appointed for that purpose. After the Restoration in 1660, feudal tenures, the Court of Wards and Liveries, and the right of purveyance with the corresponding revenues were finally abolished by the 12 Car. II. c. 24, and it appears that Parliament contemplated a perpetual grant of £100,000 per annum by a tax levied on land in lieu of these revenues (*u*). This resolution was not carried into effect, and the Act abolishing the feudal tenures granted the Crown certain taxes on ale, beer, and other liquors to make up for the loss of the feudal revenue, thus very unfairly penalising owners of property in general.

The assessment system of the Commonwealth was adopted under Charles II. (*x*). From 1692 the term "Land Tax" is used, but covers personalty, levied at various rates from 1*s.* to 4*s.* in the £; it was fixed in 1798 (*y*) at 4*s.*, when it was made distinct from the tax on personalty, which had been regularly evaded. It was reduced by Acts of 1802 and 1896 to a sum not exceeding 1*s.* Quotas were fixed for England and Scotland under the Act of Union in 1707, and made perpetual for the countries and the various counties and boroughs (*z*). Arrangements were made for redemption, for assessment by district commissioners whose decision is final, and for certain exemptions. The Inland Revenue Commissioners are the controlling authority since 1813.

### *The Inhabited House Duty.*

**History and Incidence.**—This tax was a successor of the Hearth Tax, and was first imposed in 1778; it was, however, abandoned in 1834, but re-imposed in 1851 (*a*) on the abolition of the Window Tax, which was first imposed in 1696. It was charged on all inhabited houses, where someone slept on the premises (*b*). The assessment was made by local assessors under the local Income Tax Commissioners,

(*s*) See p. 386, *ante*.

(*t*) See Scobell, Collection of Acts and Ordinances, 1640—1656, pp. 400 ff.

(*u*) See resolution of the House of Commons to that effect, Com. Journ., 1660, p. 45.

(*x*) See, amongst others, 12 Car. II. cc. 2, 27; 29 Car. II. c. 1; 1 Will. & M. sess. 2, c. 1, where the rate was 2*s.* in the £ on the annual value of real and personal property.

(*y*) 38 Geo. III. c. 60; 42 Geo. III. c. 116; *R. v. Tower Land Tax Commrs.* (1853), 22 L. J. Q. B. 386; 43 & 44 Vict. c. 19, s. 114; 59 & 60 Vict. c. 28. The system of quotas dates from 1697.

(*z*) 6 Anne, c. 11, s. 9; 38 Geo. III. c. 5, ss. 2, 128. For further changes, see 42 Geo. III. c. 116, as to redemption; Finance Act, 1896, ss. 31—35, as to valuation and thirty years' redemption.

(*a*) 14 & 15 Vict. c. 36.

(*b*) *Riley v. Read* (1879), 4 Ex. D. 100.

whose decision was final unless they stated a case for the High Court. The tax was abolished by the Finance Act, 1924 (c).

### *The Death Duties.*

In a sense death duties are comparable with the feudal reliefs payable by an heir to the feudal lord and the King's *primer seisin* the right to a year's profit payable by a tenant *in capite*. Those fell with the abolition of feudal tenures in 1661 (d), but in copyhold tenure they remained so long as that system endured.

**Estate Duty.**—The earliest form of death duties is that of probate duties imposed in 1694, which virtually were superseded by the Finance Act, 1894 (e). That measure imposes an estate duty, roughly speaking, on all real and personal property passing on death, in the United Kingdom, in all cases, and also on personalty abroad in the case of persons domiciled in the United Kingdom. Appeal from the Inland Revenue Commissioners on issues of valuation or rate of charge lies to the High Court, and by its leave or that of the Court of Appeal to the latter; where the value is not over £10,000, appeal lies in the alternative to the County Court and thence to the Court of Appeal (f). An affidavit of the estate must be given by executors or administrators within six months; duty must be calculated as at death, and payment in the case of realty may be paid in eight yearly instalments. Further provision is made in the Law of Property Act, 1925 (g).

Settlement estate duty, imposed by the Finance Act, 1894, was removed by the Finance Act, 1914.

**Legacy Duty.**—Legacy duty was first imposed in 1780 (h), regulated in 1796 (i), and now levied under the legislation of 1910 (k). It is payable on all personal property (l) passing to legatees or to those entitled on intestacy, and falls on the beneficiary, being levied on a graduated scale. The legacy receipt must be stamped within twenty-one days of payment with the proper stamp duty (m). The duty is payable on personal property anywhere, provided the deceased was domiciled in the United Kingdom (n), but administration is ruled by *lex loci* (o).

**Succession Duty.**—Succession duty was imposed in 1853 (p) to cover successions not touched by legacy duty, and the rate was revised

(c) 14 & 15 Geo. V. c. 21, s. 21.

(d) 12 Car. II. c. 24.

(e) 57 & 58 Vict. c. 30. Legacy and succession duties are made also payable: 10 Edw. VII. c. 8, s. 58 (2).

(f) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 10; Finance Act, 1896 (59 & 60 Vict. c. 28), s. 22.

(g) 15 Geo. V. c. 20, ss. 16—18.

(h) 20 Geo. III. c. 28.

(i) 36 Geo. III. c. 52.

(k) See 55 Geo. III. c. 184, s. 2, Sched., Pt. III.; 10 Edw. VII. c. 8, s. 58.

(l) Except leaseholds, subject to succession duty (16 & 17 Vict. c. 51, ss. 1, 19).

(m) 36 Geo. III. c. 52, ss. 21, 27, 29.

(n) *Thomson v. Advocate-General* (1845), 12 Cl. & F. 1.

(o) *Blackwood v. R.* (1882), 8 App. Cas. 82; *Preston v. Viscount Melville* (1841), 8 Cl. & F. 1, H. L. (Sc.). Cf. *Wilks, In re*; *Kepper v. Wilks*, [1935] Ch. 645.

(p) 16 & 17 Vict. c. 51.

in the legislation of 1910 (*q*). It embraces all property devolving on death or passing by a disposition made otherwise than for money or its worth: (1) realty in the United Kingdom; (2) personalty (including leaseholds) of predecessors domiciled in the United Kingdom at the time of creation of the succession; foreign personalty is not liable if the predecessor was domiciled abroad, save in the case of property subject to a British trust or recoverable only in a British Court (*r*); (3) legacies charged on real estate of persons dying on or after July 1, 1888. The duty is payable by the successor, or by the trustees in whom the legal estate is vested, or by persons taking under a derivative title. The mode of valuation is regulated by the Finance Act, 1894 (*s*), on analogy to the estate duty.

### *The Land Value Duties.*

Duties on (1) increment value on grants of land, or leases, or interests passing on death, measured by the increase of site value; (2) reversions of leases; (3) undeveloped land; (4) mineral rights were imposed in 1910, but the first three were abolished by the Finance Act, 1920 (*s*. 57), the last by the Finance Act, 1921 (*s*. 40). A proposal to revive the principle in the Finance Act, 1931 (*s*. 10), was suspended in the Finance Act, 1932 (*s*. 27), and abandoned in 1934.

### *The Stamp Duty.*

While stamps are used as a matter of convenience to show payment of death duties, &c., they are also employed as a mode of levying duties on instruments attesting important legal transactions. The first general Act was passed in 1694 (*t*) applying to various writs, affidavits, copies of wills, probates, &c., and it was the simplicity of the taxation, lack of a stamp rendering a document invalid as evidence, which led to the extension of the system to the colonies in the famous Stamp Act of 1765. The system has been extended to bills of exchange, promissory notes, and many other documents, and the principle adopted of varying the charge according to the value of the transaction (*u*).

### *The Post Office.*

Constitutionally the Post Office is of interest, as originally the system was operated, under prerogative, by James I. and Charles I. In 1660 (*x*) the matter was regulated by statute; in 1710 (*y*) on the union of the Crowns a most important statute with imperial validity was enacted, the revenue being divided between the civil list and the public services. In 1760 the Post Office was surrendered with the

(*q*) 10 Edw. VII. c. 8.

(*r*) *Att.-Gen. v. Campbell* (1872), L. R. 5 H. L. 524; *Re Cigala's Settlement* (1878), 7 Ch. D. 351; *Att.-Gen. v. Felce* (1894), 10 T. L. R. 337; *Att.-Gen. v. Jewish Assocn.*, [1901] 1 K. B. 123.

(*s*) 57 & 58 Vict. c. 30, s. 18. For limitation of the impost, see Finance Act, 1914 (4 & 5 Geo. V. c. 10), s. 13 (2). (*t*) 5 & 6 Will. & M. c. 21.

(*u*) The Stamp Act, 1891 (54 & 55 Vict. c. 39), and amendments.

(*x*) 12 Car. II. c. 35.

(*y*) 9 Anne, c. 11. The Acts are consolidated by 8 Edw. VII. c. 48.

other hereditary revenues, and, in 1787, they were paid to the Consolidated Fund. Only in 1849 (12 & 13 Vict. c. 66) was control over these sources and revenues handed over to the colonies. The monopoly of communication by post (z) and telegraph and telephone (a) rests on statute. The office also carries on a vast savings bank business, sells annuities, and carries out investment in government stocks. Large profits are made, and the Treasury carefully controls the office as a source of revenue (b). The principle of restricting the revenue share is now in force; in 1937—38, £13,700,000 was taken.

### *Other Revenues.*

By a tax on motors and the fuel necessary for their propulsion an enormous sum is raised annually, originally earmarked for the Road Fund (c). Constitutionally the system was important, for the grants from the fund largely eluded systematic control of the House of Commons. For general revenue £5,000,000 was taken annually, and after 1931 the former principle of uncontrolled borrowing was abandoned. From April 1, 1937, this undesirable plan was dropped, and Parliament provides sums directly for the fund, in 1938—39, £22,000,000.

### *The National Debt.*

The needs of the State were secured without the creation of a national debt until Charles II., in 1672, failed to repay his loans from the goldsmiths, though he paid interest down to 1683; only in 1699 was provision made for resumption of payment (d). In 1694 the Bank of England was established in return for a loan of £1,200,000 at 8 per cent. The sum was never repaid; the debt amounted to sixteen millions at William III.'s death, to fifty-four millions under Anne; the Spanish War of 1739—42 added thirty-one millions, the Seven Years War increased it to £146,000,000. The War of American Independence added £121,000,000, the French Revolutionary War £601,000,000. Attempts to reduce by a sinking fund under Walpole were frustrated by war, and Pitt's permanent sinking fund of one million was absurdly inadequate and expensive (e). From 1829 efforts were made to reduce debt from surplus revenue; in 1875 a new sinking fund maintained by annual votes (f) began. It consisted of the application to extinction of the debt of any surplus on the interest provided for the service of the debt. The old sinking fund on the other hand is the application, if so determined by Parliament, of any surplus

(z) 1 Vict. c. 33, s. 2; 8 Edw. VII. c. 48, s. 34. See also Post Office and Telegraph Act, 1920 (10 & 11 Geo. V. c. 40); Post Office (Amendment) Act, 1935 (25 Geo. V. c. 15).

(a) 32 & 33 Vict. c. 73, s. 4; *Att.-Gen. v. Edison Telephone Co.*, 6 Q. B. D. 248.

(b) See Report of Inquiry, 1932, Cmd. 4149.

(c) 10 & 11 Geo. V. c. 72, s. 3 (1).

(d) 12 & 13 Will. III. c. 12. This was the origin of the 3 per cents.; in 1752 there was consolidation of two sets of annuities and pooling of the revenues on which they were charged. Hence "consols."

(e) Lecky, *Hist.*, v, 49—52.

(f) 38 & 39 Vict. c. 45. So also under the Finance Act, 1928 (18 & 19 Geo. V. c. 17), s. 23, and annually since; see 1 Edw. VIII. & 1 Geo. VI. c. 54, s. 26.

revenue over the expenditure of the year. By 1899 the debt fell to £635,040,695, but the saving of 153 millions during the reign was swept away by the Boer War. Economy reduced it, by 1914, to 708 millions, but enormous sums were added by war expenditure and loans to the allies, later enormously reduced in amount at the expense of the British taxpayer (g).

The debt is now classified as (1) permanent funded debt, the effect of Goschen's conversion scheme which created  $2\frac{1}{2}$  per cent. consols, on March 31, 1938, £3,364,770,942; (2) terminable annuities, £12,539,750; and (3) unfunded short term debt, £4,746,874,596. There was in addition an external debt of which, however, the major portion is due to the United States and payment of which is uncertain; on the credit side there is no prospect of payment of the much larger foreign war debts. The decision to borrow for defence £400,000,000 in five years in 1937 was a serious, if necessary, addition. The sum is to be paid off by thirty equal instalments from 1942 in thirty years; up to then 3 per cent. interest is payable from sums voted for defence purposes. The amount borrowed falls to be reduced by the amount of the old sinking fund each year (if any); 1936—37 ended in a deficit of £5,597,000. Larger borrowings have been necessitated by the rearmament plans of 1939.

**National Debt Commission.**—The National Debt Commissioners were constituted in 1786 by the Act 26 Geo. III. c. 31 for the primary purpose of applying sinking funds to the reduction of the national debt. Work is done by the Comptroller of the National Debt Office and his staff. They receive sums available from departments for investment, receive and apply sinking funds, sell and pay annuities, control the local loans and Irish land purchase funds. The funds of the Post Office and Trustee Savings Banks, of the friendly societies, and of the National Insurance Commission and unemployment insurance funds are dealt with by them. Other sums dealt with are those of the Public Trustee, the Official Trustees of Charitable Funds, and the Supreme Court of Judicature. The business of loans to local authorities from funds supplied by the National Debt Commissioners falls to the Public Works Loan Commissioners (set up in 1817). The total amount which may be advanced each year is controlled by the Public Works Loans Act, passed annually (h).

(g) Efforts at systematic reduction inaugurated by Mr. Churchill were brought to ruin by the events of 1929—31; in 1936—37, £224,000,000 was provided for interest and management of the public debt and as money was saved on interest, actually £13,127,270 was used to reduce debt. For 1937—38, see 1 Edw. VIII. & 1 Geo. VI. c. 13, s. 1 (3). A number of sinking funds exist for specific purposes: Victory bonds; Funding Loan Sinking Fund, 4 per cent. and 3 per cent.; payments for death duties under s. 3 of the War Loan Act, 1919, and others not at present operative. Terminable annuities represented on March 31, 1938, £12,539,750.

(h) See E. Hilton Young, *System of National Finance*, chap. ix.

## CHAPTER II.

## EXPENDITURE AND AUDIT.

**Objects of Expenditure.**—The main objects of expenditure are now interest on the national debt, on the defence services, on the civil service, and on social betterment of all kinds. In 1938—39 estimates for defence totalled originally, in all, £256,062,000, plus £90,000,000 borrowed under the Defence Loans Act, 1937, to which supplementary estimates were added, to be met by borrowings. For debt interest and management was provided £230,000,000; war pensions, £39,653,000; old age pensions, £48,117,000; grants to health insurance, unemployment insurance and assistance and widows', orphans' and old age contributory pensions, £90,741,000; collection of customs and excise, £5,868,000; of inland revenue, £9,005,000; other services, £40,927,000; post office and broadcasting, £80,442,000. The general grant for local services was £54,933,000; education, £57,123,000; housing, £17,647,000; roads, £21,762,000; police, £13,927,000; air raid precautions, £2,000,000; special areas, £7,500,000. For agriculture, £11,445,000 was granted, and £3,581,000 for foreign and imperial services. The gross total was £944,398,000, in addition to post office and broadcasting, which are self supporting. For Irish services £16,036,000 was allocated.

*The Development of the System of Control.*

As the revenues of the Crown were in early times paid to the King's officers, control of receipt and issue rested with his Exchequer, more specially the Lower Exchequer of Receipt, where the business was transacted by the treasurer's clerk and two chamberlains. The three kept separate accounts of receipt and of issue, while up to 1826 payers received tallies recording their payments. In the Tudor period four tellers appear who made and recorded issues; the chamberlains' functions fell to dealing with tallies; an Auditor of Receipt received the tellers' accounts and was given control over issues, recording issues and receipts, a function also performed by the Clerk of the Pells. These offices, held by political leaders, were rewarded by enormous fees, replaced by salaries in consequence of legislation of 1783, and only disappeared in 1834.

Payment was authorised by the Crown, but a measure of safety was secured by the requirement of documents under the great seal or privy seal, and by a system of Treasury warrants (a). This control

(a) See 8 & 9 Will. III. c. 28. For the necessity of a seal, see *Vernon v. Benson* (1723), 9 Mod. Rep. 47.

was reinforced under Charles II., when Parliament laid down the principles of specific appropriation and audit to secure the carrying out of its purpose (*b*). The system demanded (1) a royal order; (2) the sending of letters of privy seal to the Treasury; (3) their transmission with a Treasury warrant to the Auditor of Receipt, who signed an order for payment; (4) this order and the warrant were returned signed by members of the Treasury Board; and (5) the money could then be paid out by the tellers, with the co-operation of the Auditor of Receipt, whose authority was really that of a controller, and the Clerk of the Pells. But the control was formal, not real: Lord Grenville in 1806 was First Lord of the Treasury and Auditor at the same time and, in 1811, he used when in opposition his Auditorship to compel the Government to meet his views on the Regency Bill before he agreed to the issue of money in the absence of royal authority owing to the King's madness.

Audit was provided for first by the Barons of the Exchequer; under Elizabeth by Auditors of Imprest; from 1785 to 1866 by Commissioners of Audit. In 1787 (*c*) the confused system of charging expenses on special branches of revenue was abandoned in favour of a single consolidated fund into which all payments must be paid. In 1802 accounts were first presented of receipts and expenditure as a whole, in 1822 balanced accounts, and from 1832 naval, 1846 military, and 1866 civil appropriation accounts, showing the correspondence of grants and expenditure (*d*). In 1834 the Exchequer officials disappeared, a Comptroller-General of independent tenure of office replaced the Auditor of Receipt and the Clerk of the Pells, all receipts were to be paid to the Exchequer account at the Bank of England or Ireland, and a Paymaster-General was to make such payments as had been issued at the Exchequer as opposed to the Army, Navy and Ordnance Paymasters (*e*).

### *The Present System.*

**Consolidated Fund Services.**—The present system depends on the Exchequer and Audit Act, 1866, as amended (*f*). The Consolidated Fund is constantly fed by the proceeds of revenue, but to operate on it requires Parliamentary authority, and this takes the form of permanent or annual appropriations. The distinction is the basis of the Consolidated Fund and the Supply Services. The charges on the Consolidated Fund include interest on the national debt, contributions to Northern Ireland, the civil list, salaries of judges, the Comptroller and Auditor-General, the Speaker, and certain officials. When any money is needed (*g*), the Treasury applies to the Comptroller

(*b*) Both are recorded under Edward III., but it is only in 1665–67 that they were introduced in deliberate control of Crown action. For the irregularities in war expenditure, see Clode, i, 110–141.

(*c*) 27 Geo. III. c. 13.

(*d*) 2 & 3 Will. IV. c. 40; 9 & 10 Vict. c. 92; 29 & 30 Vict. c. 39.

(*e*) 5 & 6 Will. IV. c. 35; 11 & 12 Vict. c. 55, consolidating all the Paymasters into one office.

(*f*) 29 & 30 Vict. c. 39.

(*g*) See p. 114, *ante*.

and Auditor-General for a credit on the Exchequer account at the Bank of England; if authority exists, that officer gives the order; the Treasury then requires the Bank to transfer the sum to the credit of the Paymaster-General.

**Supply Services.**—The Treasury is responsible for the control of the estimates, which each department prepares, and in case of dispute the Cabinet determines the issue; the defence departments, however, escape the full weight of Treasury criticism of detail, but the position is to some extent safeguarded by the fact that defence policy and expenditure are carefully considered by (1) the chiefs of Staff Committee, and (2) the Imperial Defence Committee, before final approval by Cabinet. Control has weakened since the State from 1906 assumed the burden of social services. But it serves to keep control on the systematic treatment of all issues of establishment, pay, allowances, &c., and is aided by the obligation of the accounting officers of the departments to assist control. These officers are now normally the highest officers in each department, and most of them take seriously their obligations, which were restated by the Treasury in 1937 (*h*). They are pecuniarily responsible for irregular expenditure or for excesses above limits authorised, unless written protest has been made to the head of the department, and written authority has been given (*i*); if overruled, protests may be communicated to the Treasury and the Comptroller and Auditor-General (*k*). The voting of the estimates by Parliament has been described (*l*). It is essential from the first to have votes on account for the civil service and defence, and these are included in the Consolidated Fund Acts. These Acts, it must be noted, authorise the use of the funds granted, not merely in respect of votes already passed in Committee of Supply, but of votes which may be passed after each Act but within the year. Hence, so long as there are funds not expended, they can be made available as soon as a vote is passed in Committee of Supply and reported, without waiting for the resolution in Committee of Ways and Means and another Consolidated Fund Act or the Appropriation Act (*m*).

The use of the sums is then provided for by (1) a royal order countersigned by two Lords of the Treasury to the Treasury to authorise release of the sums granted by the Bank; (2) authority from the Comptroller and Auditor-General; (3) instructions from the Treasury to the Bank to make the transfer desired from the Exchequer account to the Paymaster-General, and to inform the Comptroller accordingly.

**Audit.**—The Comptroller and Auditor-General receives daily returns from the banks of issues and receipts from and to the fund, and from

(*h*) See *Epitome of the Reports from the Committees of Public Accounts, 1857—1937* (H. C., 154, 1938), pp. 28, 30 f., 68, 199, 605 ff., 633.

(*i*) *Ib.* pp. 46 ff., 69, 609, 611, 764. For laxity in the Pensions Ministry in 1918, see pp. 588—590.

(*k*) *Ib.* p. 624. Where he is head of the department, this is not easy.

(*l*) See p. 112, *ante*.

(*m*) Where there is no such authority by Act, a resolution in ways and means is not enough: H. C. 154, 1938, p. 458.

the revenue departments of their payments. These returns go also to the Treasury. The audit department carefully audits the accounts, and presents to Parliament a report on the appropriation accounts which are sent to the department by the several departments. The audit covers (1) accountancy, securing accuracy of computation and vouchers; (2) appropriation, to assure that expenditure is charged to the proper heads; and (3) administration, to secure that there is due authority. The Comptroller and Auditor-General is also required (*n*) to check assessment, collection and allocation of revenue, and, if required by the Treasury, stock and store accounts and trading accounts of departments. The Treasury from its records presents to Parliament finance accounts of receipts and issues, but issues show only purposes of issue. The functions of the Public Accounts Committee in dealing with the reports have been noted above (*o*). The Treasury uses its reports to instruct departments in the ways of economy and sound accounting; yet it is regrettable that each report reveals serious irregularities and lack of common sense, and in the case of the defence departments reasonable co-operation. Grave danger evidently exists of wasteful expenditure on re-armament, and repeated demands have been made in the Commons for a Ministry of Supply. The Estimates Committee in 1937 reported rather favourably on what had been done, but indicated serious possibilities of undue charges, and accusations of waste were freely made in the Commons in 1938—39.

**Special Cases of Expenditure.**—There are certain provisions to allow of the Government meeting unexpected expenditure. The Civil Contingencies Fund, fixed by statute at £1,500,000 (*p*) provides funds for (1) established services where the grant has not yet been formally voted, (2) for services for which Parliament has made no provision in the estimates for the year, and (3) for departments which have exhausted the sums appropriated under votes. The moneys granted from it by the Treasury are later voted by Parliament and then repaid to the fund either before or after the close of the financial year. The purchase of the Codex Sinaiticus (*q*) from this source in 1932 for £100,000, while a supplementary estimate was presented only in June, 1934, was disapproved by the Public Accounts Committee but defended by the Treasury virtually because the public thus was induced to subscribe more generously (£51,560). The Treasury Chest Fund (*r*) is used as a means of making advances to sub-accountants of defence and civil departments overseas, and the sums are duly repaid within the year or next year by the departments from the sums voted by Parliament. It is in effect a banking fund for the use of the naval, military and air departments in particular, and always abroad, and advances from it are normally made on the credit only

(*n*) Exchequer and Audit Departments Act, 1921, ss. 2 (1), 4, 5.

(*o*) See p. 116, *ante*.

(*p*) Finance Act, 1921, s. 52.

(*q*) 292 H. C. Deb., 5 s. 2542—2553; H. C. Pap., 154, 1938, pp. 753 f.

(*r*) 40 & 41 Vict. c. 45; 56 & 57 Vict. c. 18. Exchange needs render it essential: cf. Hilton Young, National Finance, pp. 166 ff.

of money actually granted and available for repayment. In these respects it differs essentially from the Civil Contingencies Fund. Accounts of both funds are carefully scrutinised by the Public Accounts Committee, which is jealous of any tendency to loosen the system of control. There are dangers in the use of the funds; in 1914—15 only was a vote taken for £50,000, advanced in 1911—12, and £120,000 advanced in 1912—13, and the Treasury had some difficulty in persuading the Committee that the action was defensible (s). Further, in war emergency, Parliament will grant advances as in 1914—18, by votes of credit, subject only to Treasury control, and report (t). This was resorted to in the war of 1914—19, and when it came to an end, in 1919, the Civil Contingencies Fund had temporarily to be increased to £120,000,000 to enable it to finance the concluding stages of the vast trading services undertaken for war purposes by the State. The Treasury has also by statute (u) a limited power of allowing money to be used which has not been appropriated; if a vote includes sums received in respect of the services involved (*e.g.*, fees and fines), and the sums anticipated do not materialise, but other sums are obtained from analogous sources, it may allow their use in lieu (x). The Treasury also is the authority which allows expenditure in excess of estimates, but it must allow the Public Accounts Committee to examine its action, and obtain Parliamentary authority later, and it has been called to account for unwise action, as when, in 1930, moneys were used for extension of school accommodation in anticipation of legislation, the Education (School Attendance) Bill, which the Government could not carry (y).

The use of the Appropriation Act to extend authorities of public departments beyond what is given by legislation is deprecated by the Public Accounts Committee (z).

Great care is taken that the power of the Treasury to approve transfer between sub-heads of civil votes and between votes of defence services (*virement*) is not used so as to permit services to be undertaken without consent of Parliament (a).

There are in certain cases funds, drawing resources from non-governmental as well as from governmental sources, which are subject to the scrutiny of the Public Accounts Committee. The Wheat Fund of 1932 is derived from a tariff whose proceeds are earmarked to benefit home producers. Other funds drawing sums from non-governmental sources in large degree are the Unemployment Insurance and National Health Insurance Funds. There are also the Herring Marketing Fund, the Cattle Fund, the Forestry Fund, the Miners' Welfare Fund, the Post Office Fund, the Road Fund, and Special Areas Fund.

(s) H. C. Pap., 154, 1938, p. 554; see pp. 451—453.

(t) *Ib.* pp. 569 ff.

(u) Public Accounts and Charges Act, 1891 (54 & 55 Vict. c. 24); H. C. Pap., 154, 1938, pp. 332 f., 355, 371.

(x) *China Navigation Co. v. Att.-Gen.*, [1932] 2 K. B. 197.

(y) H. C. Pap., 154, 1938, p. 724.

(z) *Ib.* pp. 723—727.

(a) *Ib.* pp. 10—12 (history to 1862), 224 ff., 328 f., 348 ff., 460, 556, 621 f., 640, 732.

**Exchange Equalisation Account.**—The most significant of recent funds is the Exchange Equalisation Account, now of £550,000,000, which is used by the Treasury through the Bank of England, secretly, to prevent violent fluctuations of exchange. It rests on the Finance Act, 1932, Pt. IV., and is audited by the Auditor-General, whose certificate is included in his report on the Consolidated Fund Accounts. But no report was to be made on it to the Public Accounts Committee until it was wound up (b). In 1937, however, on its increase by £200,000,000, the Committee was given power to examine, and a strictly limited amount of information is given as to its holdings of gold (c).

**Anticipation of Parliamentary Sanction.**—A very remarkable case of irregular action is recorded as regards Czechoslovakia. The British Government, having compelled surrender to German demands, felt bound to supplement its guarantee of the State from aggression by affording immediate pecuniary assistance. The Bank of England was induced to grant £10,000,000 as a credit to the State. The Government only took steps to obtain Parliamentary approval by Act in February, 1939, when the Czechoslovakia (Financial Assistance) Bill was brought in, under which £4,000,000 was to be given as a free gift and the rest as a loan. Mr. Wedgwood Benn insisted on the danger of such action, as also in the case of making large purchases of stores (d), without immediate authority of Parliament.

(b) E. Hilton Young, *System of National Finance*, pp. 213 ff.; 22 & 23 Geo. V. c. 25, s. 24; 1 Edw. VIII. & 1 Geo. VI. c. 41.

(c) Thus three months after each quarter notice is given of the total amount held at the end thereof. In January, 1939, £200,000,000 was transferred from the Bank of England to combat the weakening of sterling.

(d) *Essential Commodities Reserves Act, 1938* (1 & 2 Geo. VI. c. 51).

## PART VII.

### The Church.

#### CHAPTER I.

##### THE CHURCH OF ENGLAND.

IN legal phraseology, as in the Coronation Oath, the English Church is spoken of as being "by law established," and this means that the Church is built into and forms part of the fabric of the Constitution, mainly by the legislative enactments of the reigns of Henry VIII., Edward VI., and Elizabeth. The changes brought about by these enactments were both doctrinal and constitutional, converting a branch of the Roman Catholic Church into an independent Protestant Episcopal Church (*a*). The doctrine of the Church was fixed by Thirty-nine Articles, which declared the authority of every national church to ordain, change, or abolish ceremonies or rites ordained only by man's authority. Constitutionally, the changes brought about by the Reformation were: (1) The abolition of the Papal authority, and the restoration of the judicial authority of the Crown over ecclesiastical causes; (2) the subordination of the legislative powers of the clergy to the Crown and Parliament; (3) the sanction given by Parliament to the Thirty-nine Articles and the Book of Common Prayer.

**The Church before the Reformation.**—Previously to the Reformation the position of the Church was briefly as follows. The Conquest of 1066 favoured by the Pope brought the English Church (*b*) into close contact with the Church on the Continent. But William I. refused to acknowledge any obligation of fealty, insisted on retaining in his hands the appointment of bishops and abbots, and forbade communication with the Pope save through himself, while he controlled ecclesiastical councils. Henry I. had to yield to the Pope on the issue of lay investiture, and to permit a Papal legate in 1125 to hold a council; but otherwise maintained a position of independence. Stephen, however, needed Papal support, and Henry II., who sought to restore the position under Henry I., failed in his effort, as a result largely

(*a*) See, *e.g.*, Roman Catholic Relief Act, 1829 (10 Geo. IV. c. 7), s. 24, where it is coupled with the Protestant Presbyterian Church of Scotland. Similarly both churches claimed the right to the provision for a Protestant clergy in the Constitutional Act, 1791, of Canada, and the Church of England asserted that it alone was Protestant: Keith, *Resp. Govt. in the Dominions* (1912), iii, 1448.

(*b*) For the situation before the Conquest, see R. R. Darlington, *E. H. R.*, li, 385—428.

of the murder of Archbishop Becket (*c*). William the Conqueror had separated the civil and ecclesiastical Courts, and the result of this separation, vainly attacked by Henry II., which was not wholly operative in the County Court under Henry I. and which was the growth of an entirely separate ecclesiastical jurisdiction to which the clergy were subject, free from any secular supervision and extending to matrimonial and testamentary causes which concerned laity as well as clergy. Appeals from the ecclesiastical Courts were often carried to Rome, in spite of the rules made by the Conqueror, the Constitutions of Clarendon, and the Statutes of Præmunire (1353 and 1393). Henry II.'s surrender in 1172 was immediately followed by a large number of appeals to Alexander III. and the spread of the canon law.

With regard to legislation, the clergy refused to attend Parliament, and legislated for, and even taxed, themselves in their own Convocations (*d*).

*The Church after the Reformation.*

**The Royal Supremacy.**—The Act of Supremacy (26 Hen. VIII. c. 1) declared the King to be "the only supreme head in earth of the Church of England." This Act was repealed by Mary, but it still exists by common law and statute (*e*). Elizabeth's Act of Supremacy (*f*) declared the Queen to be Sovereign over all persons and causes to the exclusion of every foreign power, and required all holders of office, lay and clerical, to acknowledge the same by taking the oath prescribed by the Act, recognising her as supreme governor in all things and causes ecclesiastical as well as temporal.

**Judicial Appeals.**—Appeals to Rome were forbidden in 1533 (*g*) under penalty of incurring a præmunire, involving forfeiture of estates and liberty, and by the Act for the Submission of the Clergy (25 Hen. VIII. c. 19) appeals from the archbishop were to lie to the King in Chancery, and this jurisdiction was exercised by the Court of Delegates. Eventually, in 1832, by 2 & 3 Will. IV. c. 92, jurisdiction in ecclesiastical appeals was handed over to the Privy Council, and in 1833 to the judicial committee of the Privy Council on the formation of that body by 3 & 4 Will. IV. c. 41.

Elizabeth's Act of Supremacy (*f*) went further than this, and vested in the Crown the ecclesiastical jurisdiction by *visitation*, and this was exercised by the Court of High Commission until the abolition of that body in the reign of Charles I. (*h*). James II. endeavoured to revive it under the name of the Commissioners for Ecclesiastical Causes, but the Bill of Rights finally declared such a Court illegal.

**The Crown and Convocations.**—By the Act for the Submission of the Clergy, 1534 (*i*), Convocations can only be summoned by the King's writ, and canons can only be enacted with the royal licence and assent.

(*c*) Z. N. Brooke, *The English Church and the Papacy* (1931), pp. 132–214.

(*d*) On their resistance to presence in Parliament, see Clarke, *Medieval Representation and Consent*, pp. 125 ff.; J. A. Robinson, *Church Quarterly Review*, lxxxi, 81 ff.

(*e*) 31 Hen. VIII. c. 10, s. 2.

(*f*) 1 Eliz. c. 1.

(*g*) 24 Hen. VIII. c. 12.

(*h*) 16 Car. I. c. 11.

(*i*) 25 Hen. VIII. c. 19. Cf. 27 Hen. VIII. c. 15; 35 Hen. VIII. c. 16.

By the same Act (*k*) such canons as were in use, and were not repugnant to the common or statute law, or to the royal prerogative, were to remain in use until a commission sat to inquire into and affirm them. This commission never did sit, and therefore the only canons passed before 1534 which have any legal effect are such as are repugnant neither to the common or statute law nor to the royal prerogative.

This canon law was largely based on the decretals of the Popes, Gregory IX., Boniface VIII., and John XXII., and later Papal legislation; on canons adopted in legatine councils of Otto (1238) and Ottobon (1267), subsequently accepted by national councils under Archbishop Peckham; and on constitutions of the archbishops, so far as the latter were consonant with the Papal and legatine legislation. On doubtful issues the sentences of the popes were decisive. Even in the 11th and 12th centuries it is clear that the Church used the current continental canon law, and both Becket and his opponents relied on the collection known as the *Decretum* of Gratian (*m*).

Before the passing of the statute the clergy taxed themselves by granting subsidies in the provincial synods or Convocations summoned by the archbishop. These subsidies were regularly, after 1546, confirmed by Parliament. In 1663 four subsidies were granted in this way for the last time. By agreement between the Chancellor and Archbishop Sheldon since 1664 the clergy have been taxed with the laity; at the same time they assumed the privilege of voting for the return of members of Parliament, a practice recognised by statute (*n*). Convocations are now summoned and dismissed in the following manner:—

An Order in Council is issued to the Lord Chancellor, directing him to issue the necessary writs to the archbishops. This is accordingly done, and in Canterbury the Archbishop issues a mandate to the dean of the province (the Bishop of London), directing him to summon the bishops of the province. The bishops in their turn cite the deans and archdeacons, and procure the election of one proctor for each chapter, and two proctors for the clergy in each diocese.

In York the Archbishop cites the bishops, and the latter cite the deans in their dioceses, and procure the election of one proctor for each chapter, and two proctors for each archdeaconry. The ordinary clergy are thus more largely represented in York than in Canterbury. The bishops form the Upper House; the deans, archdeacons, and proctors, with a prolocutor at their head, form the Lower House. Convocations are prorogued and dissolved by writs under the Great Seal.

The Crown's licence and consent is necessary before the Convocations can enact canons.

Letters of business are first sent by the Crown, whether on petition by the Convocations or spontaneously, to the Convocations suggesting topics for discussion, for the Convocations cannot even confer to

(*k*) 25 Hen. VIII. c. 19, s. 7.

(*m*) Brooke, *The English Church and the Papacy*, pp. 47—113.

(*n*) 10 Anne, c. 31, and 18 Geo. II. c. 18; and see Phillimore, *Ecc. Law*, p. 1538. For the change of 1663—64, see 15 Car. II. c. 10; 16 & 17 Car. II. c. 1, s. 36.

constitute a canon without the King's licence (*o*). When a canon is to be enacted, the letters of business are accompanied by a licence, in the form of letters patent, to make or alter a canon. The canon must then be confirmed by further letters patent, which grant leave to promulgate the canon, and promulgation takes place in the presence of both Houses. The Crown thus completely controls initiation of canons, and may veto their enactment.

A canon so enacted and promulgated binds the clergy, but it does not bind the laity without the authority of an Act of Parliament (*p*). And, even with regard to the clergy, it cannot be executed after the royal assent if it is contrary to the common or statute law, or the King's prerogative, or to the custom of the realm (*q*). Canons which bind the laity may be enforced by excommunication and refusal to administer the sacrament; and by 53 Geo. III. c. 127, an excommunicated person who refuses to obey the orders of the ecclesiastical Court may be sentenced to six months' imprisonment, but this in practice is obsolete; further, if he dies in contumacy, the clergy may refuse to read the burial service over him.

Where it is desired that a canon should bind the laity, the two Convocations may meet in synod and pass resolutions which Parliament may then enact, as in the case of the Book of Common Prayer in 1662 (14 Car. II. c. 4), and the modification of services therein in 1872 (35 & 36 Vict. c. 35).

In the year 1717 the Convocation of Canterbury was hastily prorogued, and was not used for the transaction of business, except on one or two occasions, until early in the reign of Victoria (*r*). From 1860 onwards Convocations have been summoned regularly, and discussions on important topics take place, as when in 1864 "Essays and Reviews" was condemned. Much valuable work has also been done in the shape of the reports drawn up by committees appointed to consider important questions affecting the Church. The absence of lay representation in the Houses of Convocation led to the formation of a House of Laymen, composed of elected members, in 1885—86, for the province of Canterbury, and in 1892 a House of Laymen was formed for the province of York. From 1896 joint sessions of both Convocations, the Houses of Laymen being also present, were held for discussion of important issues, but all formal business was necessarily transacted by the Convocations only, as the Houses of Laymen had no legal status.

**The Church Assembly.**—The difficulty of altering ecclesiastical law by the Convocations and the necessity of giving the laity a legal position in connection with proposals for change resulted in 1919 in the Church of England Assembly (Powers) Act, 1919. The

(*o*) *The Case of Convocations* (8 Jac. I.), 12 Co. Rep. 72.

(*p*) *Cox's Case* (1700), 1 P. Wms. 32; *Middleton v. Croft* (1736), 2 Atk. 650; *Exeter (Bishop) v. Marshall* (1868), L. R. 3 H. L. 17.

(*q*) *The Case of Convocations* (8 Jac. I.), 12 Co. Rep. 72.

(*r*) See Phillimore, *Ecc. Law*, p. 1540. Though convoked it was prorogued without action, as the ministries were opposed to ecclesiastical activity such as was displayed in 1717 in opposition to the Bishop of Bangor's sermon in favour of religious liberty. See Hallam, *Const. Hist.*, iii, 242 ff.

Church Assembly constituted in accordance with addresses from Convocation is composed of (1) the House of Bishops, in which sit the bishops of both provinces; (2) the House of Clergy, consisting of the lower Houses of the Convocations; and (3) the House of Laity, elected on a basis of popular representation by lay members of the Diocesan Conference, themselves elected at parochial church meetings; only members of the Church of England can vote (s). The Houses may sit together or separately (t), but any innovation touching doctrinal formulæ, or the services or ceremonies of the Church, or the administration of the sacraments or sacred rites thereof, must be debated and voted upon by each House separately, and must be finally accepted or rejected by the Assembly in the terms in which it is finally proposed by the House of Bishops. The Assembly may debate and pass resolutions of religious or public interest, but it may not purport to define doctrine in any question of theology. The powers of the Convocations are not affected by the Assembly, and it may not exercise any power or perform any function distinctively belonging to the bishops by right of their episcopal office.

Every measure passed by the Church Assembly must be submitted by the Legislative Committee to the Ecclesiastical Committee, who shall consider the measure or invite the Legislative Committee to a conference to discuss it, and the Ecclesiastical Committee shall then draft a report thereon to Parliament, stating the nature and legal effect of the measure and its views as to the expediency thereof, especially with relation to the constitutional rights of all His Majesty's subjects, but the Ecclesiastical Committee shall not present the report to Parliament until the Legislative Committee signifies its desire that it should be so presented. The report, together with the text of the measure, must be laid before both Houses of Parliament, and thereupon, on a resolution being passed by each House of Parliament directing such measure to be presented to His Majesty, such measure shall be presented to His Majesty, and shall have the force and effect of an Act of Parliament on the royal assent being signified thereto in the same manner as to Acts of Parliament. Curiously enough, on the measures as published, no mention of royal assent or enactment by the Houses is made. The Ecclesiastical Committee consists of fifteen members of the House of Lords nominated by the Lord Chancellor, and fifteen members of the House of Commons nominated by the Speaker, to be appointed at the commencement of each Parliament to serve during that Parliament, and any twelve members may sit and transact business (u). The Legislative Committee is appointed by the Assembly and includes members of all three Houses.

(s) Representation of the Laity Measure 1929, ss. 15—23. The election is every five years by proportional representation. Co-option is allowed (1937) up to ten members by agreement of all the members of the Standing Committee, 1 Edw. VIII. & 1 Geo. VI. No. 2.

(t) The Assembly and its Legislative Committee have no obligation in the exercise of their powers to act judicially, so as to be subject to control by *certiorari* or prohibition by King's Bench: *R. v. Legislative Committee of Church Assembly and Church Assembly*, [1928] 1 K. B. 411.

(u) 9 & 10 Geo. V. c. 76.

A "measure" is defined as a legislative measure intended to receive the royal assent and to have effect as an Act of Parliament. A "measure" may relate to any matter concerning the Church of England and may extend to the amendment or repeal in whole or in part of any Act of Parliament, including the Act of 1919, but it may not make any alteration in the composition or powers or duties of the Ecclesiastical Committee or in the procedure in Parliament prescribed in the Act.

The "measures" passed in pursuance of the Act, and having the effect of an Act of Parliament, are the Parochial Church Councils (Powers) Measure, 1921, Ecclesiastical Commissioners Measure, 1921, Union of Benefices Measure, 1923 (x), amended in 1936 (No. 2), Benefices Act, 1898 (Amendment) Measure, 1923, Benefices (Ecclesiastical Duties) Measure, 1926, Marriage Measure, 1930, Pluralities Measure, 1930, Benefices (Transfer of Rights of Patronage) Measure, 1930, Benefices (Exercise of Rights of Presentation) Measure, 1931, Cathedrals Measure, 1931, Benefices (Diocesan Boards of Patronage) Measure, 1932, Ecclesiastical Commissioners (Powers) Measure, 1936, Queen Anne's Bounty (Powers) Measure, 1937, and others which do not greatly concern the average layman.

This method of legislating by "measures," instead of by bill in the usual way and with the usual publicity, seems to be a novel and somewhat unconstitutional proceeding, especially having regard to the power to amend or repeal "any Act of Parliament." The control of Parliament is of dubious efficacy, though on occasion it can be successfully invoked.

**The Law of the Church.**—Parliament did not frame the doctrine or the form of worship, but it has sanctioned the Articles of Religion and the Book of Common Prayer. The Thirty-nine Articles were drawn up by a Convocation of all the clergy in 1562, and the clergy were required, by 13 Eliz. c. 12, to subscribe to them, and the penalty of deprivation is provided for maintaining doctrine contrary to or repugnant to the Articles. There is required from every candidate for ordination expression of his assent to the Articles and Book of Common Prayer and the taking of the oath of allegiance (y).

The use of the Book of Common Prayer was enjoined on all ministers by the Acts of Uniformity of Edward VI. and Elizabeth. Certain alterations were asked for by Convocation, and the rubric thus altered received Parliamentary sanction by the Act of Uniformity (14 Car. II. c. 4). In 1872 a shortened form of morning and evening service for use in cathedrals and churches was settled by Convocation and sanctioned by Parliament by the Act of Uniformity Amendment

(x) The objection of parishioners of both benefices to union as desired by the Ecclesiastical Commissioners is fatal: *Union of Benefices of Great Massingham and Little Massingham, Norfolk, In re*, [1931] A. C. 328; *Union of the Benefices of Westoe and South Shields, St. Hilda, Durham County, In re the* (1939), 55 T. L. R. 349; *Bolton-le-Moors, Lancashire, Union of Benefices, In re*, [1933] A. C. 557, shows that pecuniary advantage to the church may justify a union objected to by a parish. On the bishop's duty, see *Edburton and Poynings, In re Benefices of*, [1934] A. C. 115.

(y) 28 & 29 Vict. c. 122, ss. 1, 4; 31 & 32 Vict. c. 72, s. 8.

Act, 1872 (z). In 1927 a revised form of prayer-book was approved by Convocation and the Church Assembly by large majorities, but the measure was ultimately rejected by the House of Commons, and in 1928 it was again rejected. In practice, however, it has freely been used with the sanction of the archbishops, despite the illegality of this action. Their attitude, taken in conjunction with the illegality of many practices of Anglo-Catholic priests, has raised the question whether establishment and endowment are proper, when the recipients of payments violate their legal obligations as well as their promises to their bishops. At any rate, it is clear that the Church in many parts of the country is out of touch with the people and is only nominally national. Its defiance of law is very possibly one factor in the growing disregard for law throughout England.

**Ecclesiastical Divisions.**—For ecclesiastical purposes England is divided into two provinces (Canterbury and York), and each province is further divided into dioceses, twenty-eight and thirteen respectively. The creation of dioceses is now carried out under Measures of the Church Assembly (a); formerly they were created by prerogative letters patent, and later by statutory authority (b). Dioceses are presided over by a bishop and divided into archdeaconries, archdeaconries into rural deaneries, and rural deaneries into parishes. The Church Assembly has created, to supersede for most purposes the churchwardens and vestry, the Parochial Church Council, elected by members of the Church of either sex over age eighteen. The due enrolment of voters may be enforced by the Courts (c). Outside these there are certain divisions known as peculiars with separate ecclesiastical jurisdictions, which are, however, for the most part obsolete (d). They are analogous to the ancient liberties in secular jurisdiction. Over these divisions are the corresponding ecclesiastical dignitaries.

**Ecclesiastical Dignitaries.**—(1) *Archbishops* are appointed in the same manner as bishops, as above described, and are, like bishops, nominated by the Crown on the advice of the Prime Minister; instances of royal action not on such advice are recorded of George III. in 1783 and 1804, while Queen Victoria in 1868 practically induced Disraeli to appoint Dr. Tait archbishop, but could not force on him Dr. Wilberforce as Bishop of London. The Archbishop of Canterbury is primate and metropolitan of all England, and he enjoys the right of crowning the king or queen regnant, whilst the Archbishop of York formerly claimed the right of crowning the queen consort, but this was done by the Archbishop of Canterbury at the coronations of George V.

(z) 35 & 36 Vict. c. 35.

(a) Blackburn, Derby, Portsmouth, Guildford and Leicester (1923—25). See also the Cathedrals Measure, 1931 (21 & 22 Geo. V., No. 7).

(b) E.g., Bishoprics of Bradford and Coventry Act, 1918 (7 & 8 Geo. V. c. 57). Since 1876 nineteen bishoprics have been created.

(c) *Stuart v. Haughley Parochial Church Council*, [1936] Ch. 32.

(d) See 10 & 11 Vict. c. 98; 3 & 4 Vict. c. 86, s. 22. For Westminster Abbey, see *Cole v. Police Constable 443A*, [1937] 1 K. B. 316, which discusses the right of attendance at church services generally and in the case of peculiars.

and George VI. The authority over York originally claimed by Lanfranc and Anselm was definitely disallowed by the Papal decision under Henry II. (e).

Archbishops are styled "grace," and "most reverend Father in God," and write themselves "by divine providence," and not, as bishops, "by divine permission." The Archbishop of Canterbury is the first peer of the realm, ranking next after princes of the blood royal; the Archbishop of York ranks next after the Archbishop of Canterbury and the Lord Chancellor. The Archbishop of Canterbury has power to grant licence to marry at any time or place in either province (f) and can grant degrees, but not so as to enable registration as a medical practitioner.

Archbishops have jurisdiction as ordinary bishops within their own dioceses and on appeal from the Courts of the bishops, and also a visitatorial jurisdiction over all bishops in their province for ecclesiastical offences. Apparently they also have ordinary jurisdiction over bishops for such offences (g). They are also *ex officio* assessors of the judicial committee in ecclesiastical appeals.

(2) *Bishops* are appointed in the manner described above (h), and they are said to be installed in their cathedrals. At present twenty-four bishops and the two archbishops sit as spiritual lords in Parliament, but they are not entitled, like peers, to be tried by the House of Lords (i), for if it is declared that they are "not peers for they are not of trial by nobility."

A bishop exercises the following powers: he confers orders, confirms, consecrates churches and burial grounds, and takes part in the institution of a clerk in holy orders to a rectory or vicarage (k). He also exercises ecclesiastical and visitatorial (l) jurisdiction in his diocese, enforcing his orders in the consistory Court, and governs the revenues of the see. Bishops are in law corporations sole, and they rank next after the youngest sons of marquises. During a vacancy the temporalities of the see are in the hands of the Crown; they become vested in a new bishop only after consecration and installation and homage done to the sovereign.

In addition to diocesan bishops there are suffragan and coadjutor bishops. Suffragan bishops are appointed to fulfil the functions of the diocesan bishops, when absent, in such matters as ordinations and confirmations (m) on application to the Crown by the diocesan bishop.

(e) Cf. Brooke, *The English Church and the Papacy*, pp. 121—123, 171—174; Clarke, *Mediaeval Representation and Consent*, pp. 140 ff. For the relations of the Queen to Mr. Disraeli on ecclesiastical patronage, see Monypenny and Buckle, ii, 397—413; in general, Keith, *The King and the Imperial Crown*, pp. 365 ff.

(f) 25 Hen. VIII. c. 21. Issued from the Faculties Office.

(g) See E. Roscoe, Bishop of Lincoln's Case.

(h) See *ante*, p. 84.

(i) See *ante*, p. 85. House of Lords Standing Orders, No. 66.

(k) He can refuse on proper grounds to institute: *Heywood v. Bishop of Manchester* (1888), 12 Q. B. D. 404. But, if he refuses to license a proper nominee as a perpetual curate, he may be ordered to license, and on refusal a writ may issue to the Archbishop to admit: *Nolley v. Bishop of Birmingham*, [1931] 1 Ch. 529. An action for damages would lie: *Ferguson v. Kinnoull (Earl)* (1842), 9 Cl. & F. at p. 311.

(l) This extends only to inquiry, not to trial and sentence: *Dean of York's Case* (1841), 2 Q. B. 1.

(m) They are appointed under the provisions of the 26 Hen VIII. c. 14, and 51 & 52 Vict. c. 56. See, e.g., for Lancaster, Order in Council, July 24, 1936.

Coadjutor bishops are appointed under the provisions of the Bishops Resignation Act, 1869 (32 & 33 Vict. c. 111), to assist aged and infirm bishops in their duties.

Every cathedral has also a dean or provost and chapter, whose function nominally is to assist the bishop and act as his council in administering the affairs of his diocese (spiritual and temporal), and to join with him in making leases and grants (*n*).

The constitution, appointment, and functions of deans and chapters now depend upon certain Victorian statutes (*o*), and schemes passed under the Cathedrals Measure, 1931, (No. 7), amended in 1934 (No. 3). Since these statutes deans are appointed by letters patent from the Crown, on the advice of the Prime Minister; chapters consist of the dean and canons whose numbers vary in each cathedral, and the canons are appointed in some cases by the bishop or archbishop, and in some cases by the Crown. Under the Measure of 1931 provision may be made for administrative chapters on existing lines and general chapters to include residential and non-residential canons and prebendaries. The most recent is the Guildford Cathedral Measure, 1938 (1 & 2 Geo. VI., No. 2).

To be eligible for appointment, both deans and canons must have completed six years in orders (*p*).

(3) *Archdeacons* are appointed generally by the bishops, but the office may be in the gift of a layman who presents his nominee to the bishop. The functions of the archdeacon are to assist the bishop in the ministration of the Church and in matters relating to the inferior clergy, and he also exercised certain jurisdiction and right of visitation within the diocese (especially with regard to the maintenance and fabric of the churches within the diocese) apart from the bishop, the extent of his jurisdiction being founded on immemorial custom in subordination to the bishop's (*q*). The archdeacon's court was sometimes presided over by a judge termed *the official*, and appeal lay from the archdeacon's to the bishop's court. The qualification of archdeacons is similar to that of deans and canons (*r*).

(4) *Rural Deans* are appointed by the bishops on the recommendation of the archdeacon from clergy of the diocese, and their principal duty is to inspect and report upon buildings and the conduct and lives of the minor clergy within the rural deanery (*s*).

**The General Body of the Clergy.**—Beneath the rural dean come the general body of the clergy, and these are either *beneficed* or *unbeneficed*.

The beneficed clergy are now divided for historical reasons (*t*) into parsons or rectors, vicars, and curates perpetual. They are

(*n*) See Phillimore, *Eccl. Law*, pp. 137 ff. The government of cathedrals is now regulated by schemes prepared by Commissioners under the Cathedrals Measure, 1931, s. 10. This is the essential business of the dean and chapter.

(*o*) The principal of these are the 3 & 4 Vict. c. 113; 6 & 7 Vict. c. 77.

(*p*) 3 & 4 Vict. c. 113, s. 27.

(*q*) Phillimore, *Eccl. Law*, pp. 200 ff. This jurisdiction is mostly obsolete.

(*r*) *Viz.*, six years in holy orders (3 & 4 Vict. c. 113, s. 27).

(*s*) Especially under the Church Discipline Act, 1840 (3 & 4 Vict. c. 86).

(*t*) R. A. R. Hartridge, *History of Vicarages in the Middle Ages* (1930).

the incumbents of churches, for whose maintenance tithes (*u*) have been appropriated, originally by voluntary grant to the Church. The right to present to such benefices is often vested in private persons or corporations as well as the Crown (*x*), and ecclesiastical persons, such as bishops, or corporations, such as Diocesan Boards of Patronage under the Benefices (Diocesan Boards of Patronage) Measure, 1932. Efforts have recently been made to unite benefices in the interests of economy and efficiency (*y*).

Perpetual curates differ from rectors and vicars in that they do not require either institution or induction under episcopal authority, but merely the licence of the bishop to perform the services of the church. They are "perpetual" because they cannot be removed at the will of the person appointing. In a few cases a patron might formerly present without admission, institution, induction or licence.

**Mode of Entry upon Benefice.**—The main body of the beneficed clergy, parsons or rectors and vicars, must, if the benefice is in the gift of the Crown or a lay person or corporation (*z*), pass through the following ceremonies before they can enter upon possession of the benefice: (1) *presentation* to the bishop by the patron or lay impropiator; (2) *examination* by the bishop; (3) *admission*; (4) *institution*; (5) *induction*.

*Presentation* is a formal request in writing made by the patron or lay impropiator to the bishop, desiring him to admit and institute the clerk and to cause him to be inducted. Presentation is merely a formal act, and differs from *nomination*, which is the right to select a clerk and may be granted by the patron to some third person, the patron retaining merely the right of presentation.

(*u*) Tithes were originally paid in kind; in 1836 (6 & 7 Will. IV. c. 71) commutation for a rentcharge varying with the current price of corn and redeemable was provided for; in 1891, by 54 & 55 Vict. c. 8, the suspension or reduction of tithes under certain circumstances was provided for, and in case of non-payment a process in the County Court was substituted for distraint. By the Tithe Act, 1925 (15 & 16 Geo. V. c. 87), tithes were transferred to Queen Anne's Bounty for the benefit of incumbents. See P. W. Millard, *Law relating to Tithe Rentcharge* (1926); *Tithe (Administration of Trusts) Measure*, 1928. By the Tithe Act, 1936 (26 Geo. V. & 1 Edw. VIII. c. 43), all tithe rentcharges were extinguished on October 2, 1936, the owners receiving 3 per cent. stock in lieu. The lands subject to tithe will be freed of all charges after sixty years' payment, at first to the Tithe Redemption Commission, later to the Inland Revenue; the sums due are recoverable like any other Crown debts. But the Charge is lessened from £100 to £91 : 11s. 2d., which includes sinking fund at public cost. See the Redemption Annuities Rules, September 23, 1936 (S. R. & O., No. 1012), amended March 24, 1937 (S. R. & O., No. 231); Redemption Annuities (Extinguishment and Reduction) Rules, June 28, 1937 (S. R. & O., No. 557).

(*x*) The Crown, if it confers the office of a bishop on an incumbent, claims the right to fill the vacancy: *R. v. Eton College* (1857), 27 L. J. Q. B. 132. It acquired the patronage of many benefices formerly in the possession of religious houses on the dissolution of the monasteries, but granted it often to lay or ecclesiastical persons or bodies. The patronage of livings is divided between Prime Minister and Lord Chancellor: cf. Asquith, *Fifty Years of Parliament*, ii, 214—218.

(*y*) 9 & 10 Geo. V. c. 98 (now inoperative); Union of Benefices Measure, 1923 (No. 2); amended in 1936 (No. 2); Pluralities Measure, 1930 (No. 7).

(*z*) This may be either through *impropriation*, i.e., grant by the Crown, or as the owner of an *advowson*. Advowsons seem to have originated with the formation of parish churches, and consisted in the right of those who contributed to the building or endowment of such churches, by grants of land or money, to present a clerk to the bishop who was invested with the revenues accruing from such contribution. They may be either *appendant* to a manor or *in gross*. See Phillimore, *Eccl. Law*, p. 261.

A serious measure has recently been passed to control the exercise of the right of presentation by authorising representations by the Parochial Church Council on notification by the bishop of an impending vacancy. A council must be called into existence if one does not exist (*a*). If the patron then obtains the assent of the churchwardens, he can present; if that assent is refused, he may apply to the bishop, who may, and if required by the patron or the Church Council, must, consult a body of advisers elected by the Diocesan Conference. If the bishop refuses assent, he may be overruled by the archbishop (*b*). The Church Council and churchwardens similarly are given the right to make representations to the bishop on any proposed transfer of the right to present (*c*), and restrictions have been placed on the sale of rights of patronage (*d*).

*Examination* by the bishop is (1) as to the person, whether he is of proper age, and such like; (2) as to his conversation or character, whether he has been convicted of crime or the like; (3) as to ability, viz., whether he is unlearned and so unable to discharge the services (*e*).

*Admission*.—The examination being satisfactory, the clerk is then said to be admitted; but before institution or collation he must—

- (1) Take the oath or declaration against simony prescribed by canon 40 of 1865 (*f*).
- (2) Subscribe the declaration of assent to the Thirty-nine Articles and the Book of Common Prayer (*g*).
- (3) Take the oath of allegiance prescribed by the 31 & 32 Vict. c. 72 (*h*).

*Institution*.—After the above ceremonies the clerk must then be instituted, either by the bishop in person or by the bishop's vicar-general, chancellor, or commissary under the bishop's fiat. The ceremony consists in the utterance of certain formal words, and entry in the public registry of the ordinary.

*Induction*.—This takes place by the bishop's mandate to the archdeacon or other proper person to induct. The archdeacon either inducts the clerk himself or gives a precept to some other clergyman. The act of induction consists of putting the clerk formally into the Church. A certificate of the induction is then endorsed on the archdeacon's mandate (*i*).

(*a*) *King v. Truro (Bishop)*, [1937] P. 36.

(*b*) Benefices (Exercise of Rights of Presentation) Measure, 1931 (No. 3).

(*c*) Benefices (Transfer of Rights of Patronage) Measure, 1930 (No. 8).

(*d*) Benefices Act, 1898, Amendment Measure, 1923, forbids the sale or transfer for valuable consideration of advowsons after two vacancies have occurred subsequent to July 4, 1924; Benefices (Purchase of Rights of Patronage) Measure, 1933 (No. 1), gives certain rights to parishioners as against prior purchasers, and is retrospective.

(*e*) Phillimore, *Eccl. Law*, pp. 316 ff. The bishop may thus impose educational qualifications, and enforce them by examination. The standard of educational attainment is, unhappily, very low in many cases.

(*f*) 28 & 29 Vict. c. 122, s. 2.

(*g*) *Ib.* s. 1.

(*h*) Formerly the oaths of supremacy and allegiance (28 & 29 Vict. c. 122); altered into a single oath of allegiance by 31 & 32 Vict. c. 72.

(*i*) See Phillimore, *Eccl. Law*, pp. 359 ff.

*Collation*.—Where the benefice is in the gift of the bishop himself no presentation or examination is required. In such a case the bishop simply *collates* the clerk, *collation* being the act by which the bishop *admits* and *institutes* a clerk to a benefice of his own gift (*k*).

By the Act of Uniformity (14 Car. II. c. 4) no person is to be admitted to any parsonage, vicarage, benefice, or other ecclesiastical promotion or dignity unless he shall have been ordained priest (*l*).

**The Unbeneficed Clergy.**—Of these the most important are curates stipendiary appointed normally and paid by incumbents to aid them, but licensed by the bishop, who can withdraw a licence subject to appeal to the Archbishop (*m*). There are also ministers of chapels of ease, erected for the convenience of residents in outlying areas; chaplains, whether royal or attached to the armed forces of the Crown (*n*) or to such institutions as gaols, asylums, &c.; cathedral lecturers, and readers.

**Holy Orders.**—Whether beneficed or unbeneficed, all members of the clergy must have been admitted to Holy Orders, of which there are three, viz., bishops, priests, and deacons. The office of deacon differs from that of a full priest in that he may not consecrate the sacrament or pronounce absolution (*o*). A man cannot be ordained deacon under twenty-three or priest under twenty-four years of age, and generally (though not necessarily) if the bishop so chooses a man should be ordained deacon for one year before ordination as a priest. Both priests and deacons must be ordained according to the form set forth in the Book of Common Prayer, which received statutory authority by the 5 & 6 Edw. VI. c. 1; and previous to ordination they must have assented to the Thirty-nine Articles, the Book of Common Prayer, and the Ordination of Bishops, Priests, and Deacons, and made the declaration against simony in the form prescribed by the Clerical Subscription Act, 1865 (*p*). They must also have taken the oath of allegiance in the form prescribed by the Promissory Oaths Act, 1868 (*q*).

Under the Clerical Disabilities Act, 1870 (*r*), priests and deacons are now enabled to relinquish their orders so as to be restored to their

(*k*) *Ib.* p. 277.

(*l*) S. 10.

(*m*) 28 & 29 Vict. c. 122. The position and legal status of curates stipendiary is regulated principally by the 1 & 2 Vict. c. 107. For salaries, see 7 & 8 Vict. c. 59, s. 4; Benefices (Ecclesiastical Duties) Measure, 1926 (No. 8), Pt. II.

(*n*) Chaplains were provided from 1662; from 1811 appointments were made by selection by the Archbishops and Bishop of London; the office of chaplain general was re-established in 1846. The dubious position of a chaplain merely acting under appointment as such was asserted by the Judge of the Provincial Court of Dublin (*Mills v. Craig* (1867), Clode, ii, 751—758), and a remedy provided by 31 & 32 Vict. c. 83, allowing the Crown in Council to establish extra-parochial chapels over which an archbishop or bishop is given jurisdiction, but the power has not been exercised. For marriages, see the Marriage (Naval, Military and Air Force Chapels) Act, 1932 (22 & 23 Geo. V. c. 31). Naval chaplains are rarely, army chaplains regularly, provided by the Church of Scotland, and chaplains from the Roman Catholic Church are provided for votaries of these faiths.

(*o*) See 14 Car. II. c. 4, s. 10.

(*p*) 28 & 29 Vict. c. 122.

(*q*) 31 & 32 Vict. c. 72, s. 8.

(*r*) 33 & 34 Vict. c. 91. See *Cowan, Ex parte* (1927), 137 L. T. 515; such an enrolment can be vacated on change of intention. Provision for resumption of duties is made by the Clerical Disabilities Act (Amendment) Measure, 1934 (No. 1).

former civil status by means of a deed enrolled in Chancery, of which an office copy is presented to the bishop, who causes it to be entered in the registry of the diocese.

**Privileges and Disabilities of the Clergy.**—The status of the clergy involves certain privileges and disabilities. A clergyman cannot be called upon to serve in any temporal office, nor may he be an advocate in any civil cause concerning blood or in any cause except such as are allowed by law (*s*). He is not bound to serve in war (*t*) or on a jury (*u*). He cannot be arrested during attendance on Divine service or on a visitation, and *eundo, redeundo, et morando* (*x*); but he is not protected in such cases under a criminal warrant (*y*). He is also exempt from tolls when on parochial duty (*z*); and probably he cannot be called upon to disclose anything communicated to him under the seal of confession (*a*).

On the other hand, a clergyman cannot be elected a member of Parliament (*b*). But by the Ministers of Religion (Removal of Disqualifications) Act, 1925 (*c*), no person shall be disqualified for being elected or being a councillor of a borough by reason only that he is in Holy Orders or a regular minister of a dissenting congregation; and he may be a county, district, or parish councillor.

Without licence from the bishop a clergyman may not (under penalty of a fine) farm on his own account more than eighty acres (*d*), or engage in or carry on any other trade or dealing for gain or profit, except under certain circumstances (*e*), and if he does so he is subject to suspension or deprivation (*f*). His contracts are, however, valid in a civil Court, and he is subject to the bankruptcy laws (*g*). A regular system of pensions has been arranged (*h*). There is a Pensions Board under the Clergy Pensions Measure, 1926 (No. 6), which describes all questions as to qualifications for and rates of pension, with a possible appeal on a point of law to the High Court, whose decision is final.

Clergymen are exempted from performing the service at a cremation (*i*), and from performing the marriage service for divorced

(*s*) Ottobon, pp. 89, 91. The King may, however, employ the clergy in any post of civil government.

(*t*) 2 Co. Inst. 9. This rule was applied in the War of 1914–18 to all regular ministers of any religious denomination; e.g., 8 Geo. V. c. 5, First Sched.

(*u*) *Beecher's Case*, 4 Leon. 190.

(*x*) Phillimore, Eccl. Law, p. 475. For protection in attending convocation, see 8 Hen. VI. c. 1.

(*y*) Cripps, p. 67.

(*z*) 3 Geo. IV. c. 126, s. 32.

(*a*) It is stated to the contrary in Stephen, Digest of the Law of Evidence, Art. 117; but see the note thereon, and the regular practice respects such confessions.

(*b*) 41 Geo. III. c. 63.

(*c*) 15 & 16 Geo. V. c. 54, s. 1.

(*d*) 1 & 2 Vict. c. 106, s. 28.

(*e*) *Ib.* s. 29.

(*f*) *Ib.* s. 31.

(*g*) 4 & 5 Geo. V. c. 59, s. 50.

(*h*) See Measures of 1926 (No. 6), 1927 (No. 2), 1928 (No. 3), 1936 (No. 1); Clergy Pensions (Older Incumbents) Measure, 1930 (No. 6); Ecclesiastical Commissioners (Provision for Unbeneficed Clergy) Measure, 1928 (No. 1); Clergy Pensions (Widows and Dependents) Measure, 1936 (No. 3).

(*i*) 2 Edw. VII. c. 8, s. 11.

persons and for persons marrying a deceased wife's sister or a deceased brother's widow, &c. (*k*). Marriage with a deceased wife's sister or other such connection lays open a clergyman to ecclesiastical censure (*l*).

**The Ecclesiastical Commission.**—The Ecclesiastical and Church Estate Commissioners for England were incorporated by statute (*m*) to manage the estates of the Church, and many statutes regulate their activities. By their action the incomes of the bishops and archbishops have been regulated, provisions made for new bishoprics, new livings have been endowed, poor livings augmented. The management of large estates belonging to Church Corporations has been entrusted to their care. Boundaries of new parishes are subject to their control. Reference has already been made to their functions as regards union of benefices (*n*). Their powers have been extended by the Ecclesiastical Commissioners (Powers) Measures, 1936 (No. 5) and 1938 (No. 4), and by the Ecclesiastical Commissioners Measure, 1926 (No. 4).

(*k*) 15 & 16 Geo. V. c. 49, s. 184 (2); 1 Edw. VIII. & 1 Geo. VI. c. 57, s. 12; 7 Edw. VII. c. 47, s. 1; 11 & 12 Geo. V. c. 24, s. 1 (1); 21 & 22 Geo. V. c. 31, s. 1.

(*l*) 7 Edw. VII. c. 47, s. 4; 21 & 22 Geo. V. c. 31, ss. 1 (2), (3), 3 (4).

(*m*) 6 & 7 Will. IV. c. 77; 13 & 14 Vict. c. 94.

(*n*) See p. 405, *ante*. For their annual report, see Cmd. 5433 (1937).

## CHAPTER II.

## THE EPISCOPALIAN CHURCH IN IRELAND, SCOTLAND, WALES AND OVERSEAS.

THE Church of England stands in close relations of inter-communion with the episcopalian churches of other parts of the British Dominions.

*The Irish Church.*

**The Effect of Disestablishment.**—By Article 5 of the Act for the union of Ireland with Great Britain (*a*) the Irish Church was united to the Established Church of England, and the preservation of the United Church was declared to be an essential and fundamental part of the union of the two countries. Nevertheless, in 1869, the Irish Church Act (*b*) was passed disestablishing the Irish Church, and dissolving the union between the English and Irish Churches from January 1, 1871. By this Act the Church property formerly vested in the Ecclesiastical Commissioners for Ireland, and all other Church property in Ireland, was vested in the Church Temporalities Commissioners, power being, however, given to the Church to appoint a representative body, which might be incorporated by the Crown with power to hold Church property. The endowments of the Church were taken away save the life interests of existing clergy, commuted for £7,581,075, and £500,000 compensation for private endowments.

This representative body was subsequently incorporated by royal charter (*c*), and in this body the property of the Irish Church was vested by order of the Temporalities Commissioners, who were replaced by Order in Council of September 12, 1881, by the Irish Land Commission. The apportionment and management in Northern Ireland of the Irish Church Temporalities Fund was provided for on the creation of that Government (*d*). The representative body now consists of the archbishops, bishops, thirteen clergymen and twenty-six laymen chosen by the Diocesan synods, and thirteen co-opted members, clerical or lay.

All ecclesiastical corporations in Ireland were dissolved by the Act, and all ecclesiastical law and jurisdiction abolished. But the law hitherto in force, and the doctrines and ordinances of the Church (subject to any changes to be made by the Irish Church as then constituted), were thenceforward made binding on the Irish clergy in the same manner as if they had agreed to abide by the same by contract. Another effect of the Act was to deprive the Irish bishops

(*a*) 39 & 40 Geo. III. c. 67.

(*b*) 32 & 33 Vict. c. 42.

(*c*) October 15, 1870.

(*d*) 10 & 11 Geo. V. c. 67, s. 31; Northern Ireland Act, 12 & 13 Geo. V. c. 13.

of their right to sit in the House of Lords; whilst, on the other hand, the licence of the Crown is no longer necessary on the election and appointment of an Irish bishop. Private patrons were compensated for loss of rights of patronage.

**The Present Position of the Irish Church.**—The Church in Ireland is therefore now an independent body, free from any State intervention or control. Its supreme authority is the General Synod of a House of Bishops (13) and a House of Representatives (208 clerical and 416 laymen). Subject to it are twenty Diocesan synods, assisted by elected councils. The bishops of each diocese are chosen by the clerical and lay members of the Diocesan synod, and the bishops choose the primate. Parish incumbents are nominated by boards, consisting of (1) the bishop; (2) three persons (one lay) appointed by the Diocesan synod, and (3) three laymen appointed by the registered vestrymen of the parish. It can make such changes in its rules and doctrines as it thinks fit. Such rules and doctrines are enforceable upon members of the Irish clergy by the temporal Courts whenever questions as to the right to Church property are concerned, the holding of Church property being by statute considered as subject to a trust to observe the rules and doctrines in force for the time being (*e*). The Church is not in terms affected by the Irish agreement of 1921 (*f*), but by s. 16 provision is made for securing religious equality. Effect is given to this in Article 8 of the Irish Free State Constitution (*g*), now replaced by Article 44 of the Constitution of Eire.

#### *The Episcopal Church in Scotland.*

The Scottish Church is a branch of the early Episcopalian Church, and is entirely at one with the English Church on matters of religion, adopting as its standard faith the Thirty-nine Articles, and claiming the authority to change or abolish any ceremonies or rites of the Church ordained only by man's authority, allowed to every national Church by Article 34. The difference then between the Scottish and English Churches is that each has its own distinct form of internal government, and that, while the English Church is amply endowed and closely incorporated with the State, the Scottish Church is merely tolerated by, and receives no direct support in spiritual matters from, the State (*h*), but can effect, and has effected in the latest revision of its Prayer Book, of its own authority changes in services and ritual which have not yet received Parliamentary sanction in England.

The Scottish Church, however, looks to the civil power for peace and protection in the enjoyment of its rights and privileges, and acknowledges the King to be the only supreme governor within his dominions of clergy as well as laity, and it renounces the authority

(*e*) 32 & 33 Vict. c. 42, s. 20.

(*f*) 12 Geo. V. c. 4.

(*g*) Similar provision is made for Northern Ireland by sect. 5 of the Government of Ireland Act, 1920 (10 & 11 Geo. V. c. 67).

(*h*) See Preface to the revision of the Scotch Canons, 1838, quoted in Phillimore, *Eccl. Law*, at p. 1763.

of any foreign prince, potentate, or prelate within the realm (i). Though small in size—some 62,330 communicants—it is regarded with benevolent interest by the Church of Scotland and is willing to co-operate with it for all Christian ends. The Church of England has received from it many of its leaders.

There are now seven sees in Scotland, and in each diocese the bishop must appoint a dean chosen from the presbyters. The synod consists of two chambers, the bishops comprising the first, and the deans and representatives elected by the clergy from each diocese the second. In addition, a Church Council was established in 1876, composed of bishops, clergy, and lay representatives; it meets annually to discuss questions of general interest.

### *The Church in Wales.*

**The Disestablishment of the Church.**—By the Welsh Church Act, 1914, passed under the provisions of the Parliament Act, 1911 (k) (which was to come into force on such day as might be fixed by Order in Council), the Church of England in Wales and Monmouthshire was to cease to be established by law, and no person was, after September 18, 1914 (l), to be appointed or nominated by the Crown or any person, by virtue of any existing right of patronage, to any ecclesiastical office in the Church in Wales (m).

In consequence of the state of war existing with Germany, the date of disestablishment of the Church in Wales was, however, postponed by the Suspensory Act, 1914 (n), and it did not take effect until March 31, 1920.

**The Effect of Disestablishment.**—The effect of disestablishment on the Welsh Church is threefold, and relates to (1) the status and privileges of the clergy, (2) ecclesiastical Courts and laws, and (3) the property of the Church.

**The Status of the Clergy.**—On the date of disestablishment all cathedrals and ecclesiastical corporations sole or aggregate in the Welsh Church were dissolved. As from the same date no Welsh bishop as such may sit or vote in the House of Lords (o); and the bishops and clergy ceased to be connected with the Convocation of Canterbury (p).

(i) Phillimore, *Eccl. Law*, at p. 1763. For the legal status of the Church, which at first suffered from suspicions of Jacobitism and the unpopularity of dissent, see 10 Anne, c. 10; 32 Geo. III. c. 63; 27 & 28 Vict. c. 94.

(k) As to the procedure under this Act, see *ante*, p. 104.

(l) Being the date on which the Act received the royal assent.

(m) Welsh Church Act, 1914 (4 & 5 Geo. V. c. 91), s. 1.

(n) 4 & 5 Geo. V. c. 88, s. 1 (1); 9 & 10 Geo. V. c. 65, s. 2.

(o) Bishops not disqualified by the Act from sitting in the House of Lords received writs of summons as if the bishops so disqualified had vacated their sees: Welsh Church Act, 1914 (4 & 5 Geo. V. c. 91), s. 2 (3).

(p) The orphans of Welsh Church clergymen may still be beneficiaries under a charity incorporated by statute in 1809: *Clergy Orphan Corpn. v. Christopher*, [1933] 1 Ch. 267. This shows the close connection of the two Churches, with which contrast the doctrine of *Merriman v. Williams* (1882), 7 App. Cas. 484, as regards the Church of the Province of South Africa; and cf. *Colonial Bishops' Fund, In re*, [1935] Ch. 148.

*Effect of the Act on Ecclesiastical Law.*—The general effect of the Act is to abolish the ecclesiastical Courts in Wales, and the legal force of the ecclesiastical law of the Church in Wales, and to render the latter only binding in so far as it relates to property held on behalf of or by members of the Church, as though it were in trust to be held on behalf of persons bound by such law. Power was also afforded by the Act to the members of the Welsh Church to form a representative body, bishops, clergy and laity, and hold synods, with power to make regulations and constitutions, and the Crown was authorised to incorporate the representative body to hold the property of the Church (g). The representative body was empowered to establish ecclesiastical Courts, with appeal by consent of the Archbishop of Canterbury to the provincial Court of the latter, but such Courts were not to exercise coercive jurisdiction nor was appeal to lie to the Privy Council (r); and it was authorised to alter ecclesiastical law including specified Acts (s).

*Enforcement of Ecclesiastical Law as to Property.*—As from the date of disestablishment, the then existing ecclesiastical law, articles, doctrines, rites, rules, discipline, and ordinances of the Church of England (subject to any modification or alterations made under the provisions just mentioned) are binding on members of the Church in Wales as though they had mutually agreed to be so bound, and are capable of being enforced in the temporal Courts in relation to property held by virtue of the Act on behalf of the Church or any members of the same, as if such property had been expressly assured upon trust to be held on behalf of persons who should be so bound (t).

On April 20, 1922, the governing body of the Church in Wales by Bill procedure made the following words part of the law of the Church, namely, "The Courts of the Church in Wales shall not be bound by any decision of the English Courts or of the Judicial Committee of the Privy Council in relation to matters of faith, discipline and ceremonial" (u). This decision places at first sight the relation of the Church to the Church of England on the same footing as that of the Church in South Africa (x), but their relation seems to be more intimate.

**Provisions as to Church Property.**—The Church property was vested in Welsh Commissioners for division between the representative body and certain local authorities, provision being made for the preservation, compensation, or commutation of existing interests. They were given power to make rules of procedure which, if confirmed

(g) Act of 1914, s. 13. The Charter of Incorporation was approved by Order in Council, April 15, 1919 (S. R. & O., 1919 (No. 564), i, 938).

(r) *Ib.* s. 3 (3).

(s) Church Discipline Act, 1840 (3 & 4 Vict. c. 86); Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85); Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32); Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43).

(t) 4 & 5 Geo. V. c. 91, s. 3 (2). See *Price v. Welsh Church Representative Body*, [1938] Ch. 434.

(u) See *The Times*, October 19, 1922. The Constitution of the Church in Wales is, as amended, printed in the Handbook of the Church.

(x) See *Merriman v. Williams* (1882), 7 App. Cas. 484. See p. 416, note (p), *ante*.

by Order in Council, have force as if part of the Act; their decisions on law or fact are not subject to prohibition or review on *certiorari* by any Court, but appeal lies to the Judicial Committee of the Privy Council on certain issues of compensation, commutation, and private benefactions (*y*). The Commissioners' functions have been continued to December 31, 1942 (*z*).

### *The Church Overseas.*

**The Legal Position of the Church of England.**—Considerable doubt originally existed as to the position of the Church of England in the colonies. It could hardly be claimed that the whole apparatus of ecclesiastical law as it existed in England was introduced into any colony by mere settlement, but the Crown claimed the prerogative right to create bishoprics and to confer on bishops jurisdiction over clerical persons, if not over the laity. This right was reinforced by imperial legislation for Canada which endowed the Church (1791), and for West Indian bishoprics (1813 and 1833), and for India (1813); there was also local legislation in the maritime provinces of Canada and the West Indies. In Australia and New Zealand it was exercised without such support, and a like policy was adopted in South Africa, where also in 1853 the Bishop of Cape Town, who had been first appointed in 1848, was given the position of metropolitan in respect to the Bishop of Natal. Hence arose a series of law suits which were finally decided by the Privy Council, and afford certain principles.

(1) Ecclesiastical law is not part of the English law introduced into a colony by settlement or conquest by virtue of British sovereignty alone (*a*).

(2) The Crown by virtue of its power to legislate for a conquered or ceded colony may introduce such law in whole or part (*b*), and *a fortiori* may be authorised by Parliament so to act (*c*). But the power of prerogative legislation is lost when a representative constitution is granted to a colony without express reservation (*d*).

(3) The Crown, however, can legally in any territory create a bishopric by letters patent, but this does not involve the right to confer coercive jurisdiction (*e*).

(4) Where there is no Church established by law, the Church is in no better or no worse position than any other religious body; it may

(*y*) 4 & 5 Geo. V. c. 91, ss. 10—12. The Commissioners are three in number, appointed by the Crown, and present annually a report to Parliament. For the extent of their authority to decide property issues, see *Wingrove v. Morgan*, [1934] Ch. 423. They have exclusive jurisdiction only when property is vested in them, not as against the public generally.

(*z*) Order in Council, November 19, 1935.

(*a*) *Bishop of Natal, In re* (1865), 3 Moo. P. C. (n. s.) 115; *R. v. Eton College* (1857), 8 E. & B. 610. Cf. *British Columbia (Ex.) v. Cridge* (1874), 1 B. C. R., pt. 1, 5; and see Keith, Const. Hist. of First British Empire, p. 222; Const. Hist. of India, 1600—1935, pp. 160, 413.

(*b*) *Bishop of Natal v. Green* (1868), 18 L. T. 112; (1868), Natal L. R. 138.

(*c*) *Bishop of Natal, In re* (1865), 3 Moo. P. C. (n. s.) 115, 152. Local legislation is equally effective as formerly in Jamaica.

(*d*) *Campbell v. Hall* (1774), 1 Cowp. 204; *Sammut v. Strickland*, [1938] A. C. 678.

(*e*) *Bishop of Natal v. Gladstone* (1866), L. R. 3 Eq. 1.

constitute its own tribunals and form its own rules of internal government, but to enforce sentences of those tribunals it must apply to the civil Courts (*Long v. Bishop of Capetown (f)*).

Since these decisions the Crown has ceased to appoint bishops by letters patent in overseas territories. But, when an overseas bishop is consecrated in England, it is customary for the Crown to issue a licence to the archbishop for that purpose. In Scotland, Ireland, or in any oversea territory, unless prevented by the provisions of some Act of Parliament, bishops may be consecrated by other bishops without licence from the Crown.

**The Present Position of the Church.**—The various branches of the Church have accordingly organised themselves, either obtaining local legislation to confirm their position or merely forming agreements binding on their members. They are Primates in the case of Canada and Australia. There are also provinces of Canada, Ontario, Rupert's Land and British Columbia; of New South Wales, Victoria, Queensland, and Western Australia. The Union of South Africa and New Zealand have archbishops and metropolitans, there is an archbishop of the West Indies, and provinces of China and Japan. In immediate dependence on the Archbishop of Canterbury are some twenty-six bishops; their legal position is distinctly indeterminate. They are in close relations of inter-communication with the Church of England, but they are autonomous, and they are differentiated from integral parts of the Church of England in so far as they do not accept as binding the pronouncements of the Judicial Committee on issues of faith, discipline and ritual, and claim the right of regulating such issues for themselves (*g*). So in the case of South Africa the consensual Church established in 1870 is in communion with the Church of England. Funds for a bishop of the Church of England cannot legally be held payable to a bishop of that Church, but the Court of Chancery can apply the doctrine of *cy-près*, and permit payment of the income of the trust to the Archbishop of Capetown so long as the Church remains in communion, in the opinion of the Archbishop of Canterbury with the Church of England. A like result has been reached in the Union Courts (*h*).

In India bishoprics were instituted under imperial legislation in 1813 and 1833, confirmed by the Government of India Act, Part X., but under the Indian Church Act, 1927, and the Indian Church Measure, 1927, the establishment of the Church ceased on March 1, 1930, when the Churches were separated. It is replaced by the Church of India, Burma, and Ceylon in communion with the Church of England, and provision is made for the incorporation of the Indian Church Trustees to hold Church property; arrangements are made for the constitution of the new Church. The Governor-General in Council, with the sanction of the Secretary of State in Council, was

(*f*) (1863), 1 Moo. P. C. (N. S.) 411.

(*g*) *Merriman v. Williams* (1882), 7 App. Cas. 484.

(*h*) *Colonial Bishoprics Fund, In re*, [1935] Ch. 148; *Mills and Others v. Registrar of Deeds*, [1936] C. P. D. 417, discussed by Keith, *Journ of Comp. Leg.*, xviii, 283; *The Dominions as Sovereign States*, pp. 649 f.

empowered to control chaplains and services of the Church of England (i). Under the new Government of India Act, 1935, the Governor-General personally will control (k). The separation of Burma and Aden from India has been duly accompanied by the modification of the Act of 1927 (l).

In territories where the Church enjoys no legal status, it comes under the law of voluntary societies, and the civil Courts will only take cognisance of the rules made by such a voluntary association in order to determine who is entitled to property or funds under those rules, or to protect some right or interest infringed by their operation (*Forbes v. Eden* (m)). A Court will not interfere with the decision of the members of a voluntary association professing to act under its rules, where it is not shown that there was *mala fides* in arriving at the decision, or that the rules were contrary to natural justice, or that anything was done contrary to the rules in question (n).

(i) 53 Geo. III. c. 155; 3 & 4 Will. IV. c. 85; 17 & 18 Geo. V. c. 40.

(k) 26 Geo. V. & 1 Edw. VIII. c. 2, s. 269; Church of Scotland chaplains have also to be appointed. For Burma, see 26 Geo. V. & 1 Edw. VIII. c. 3, s. 122.

(l) Order in Council, 1937 (S. R. & O., No. 230, pp. 975 f.).

(m) (1867), L. R. 1 Sc. & D. 568; *Free Church of Scotland v. Overtoun*, [1904] A. C. 515; *St. Luke's (Salt Springs) Trustees v. Cameron*, [1930] A. C. 673; Keith, *Const. Law of British Dominions*, p. 437.

(n) *Wetman v. Bayne* (1928), 23 Alberta L. R. 446. For an interesting dispute over a bishopric, see *Scherbanuk v. Skoredoumov*, [1935] Ont. R. 342.

## CHAPTER III.

## RELIGIOUS TOLERATION.

THE present equality before the law of all persons whatever their religion is a matter of slow development, for both Roman Catholics and Protestant dissenters were long subjected to grave disabilities.

**Roman Catholic Disabilities.**—The Elizabethan Acts of Supremacy and Uniformity (*a*) imposed on all beneficed clergy and civil officers of the Crown the obligation to take the oath of supremacy renouncing the spiritual authority of any foreign prelate, and required the use of the Book of Common Prayer and attendance at church. In 1562 the oath of supremacy was extended to all in Holy Orders, all recipients of university degrees, lawyers, and members of the Commons. Later legislation compelled every Catholic to attend the Anglican service, suppressed the celebration of the mass, proscribed the Catholic priesthood, and made it high treason for any English priest to come to England, for a Protestant to become a Catholic, or a Catholic to convert a Protestant (*b*). James I., after the Gunpowder Plot, secured the Act of 1604 (*c*), which excluded Roman Catholics from law and medicine, from acting as guardians or trustees, and required the taking of the sacrament at least once a year on penalty of £60 fine. Under Charles II. the Test Act of 1672 (*d*) required from all holders of temporal office the taking of the sacrament and a declaration of rejection of transubstantiation, thus excluding the Duke of York from office. Under 1678 (*e*) legislation members of both Houses were subjected to the oaths of allegiance and supremacy, and a declaration that the worship of the Church of Rome is idolatrous, only the Duke of York being excluded. A later series of Acts (*f*) was directed to depriving all Catholic landholders who remained true to their faith of their land and to penalising all papist schoolmasters. In 1778 (*g*) these provisions were repealed in favour of persons who would abjure the Pretender, the temporal jurisdiction and deposing power of the Pope, and the doctrine that faith need not be kept with heretics, with the result of the Gordon riots when it was proposed to extend the measure to Scotland. In 1791 (*h*) the statutes against popish recusants were repealed, and Catholic worship and schools

(*a*) 1 Eliz. cc. 1, 2.

(*b*) 13 Eliz. c. 2; 23 Eliz. c. 1; 27 Eliz. c. 2; 35 Eliz. c. 2.

(*c*) 2 Jac. I. cc. 4, 5.

(*d*) 25 Car. II. c. 2. This was Parliament's retort to Charles II.'s efforts at toleration.

(*e*) 30 Car. II. st. 2, c. 1.

(*f*) 11 & 12 Will. III. c. 4; 1 Geo. I. st. 2, c. 13; 3 Geo. I. c. 18.

(*g*) 18 Geo. III. c. 60.

(*h*) 31 Geo. III. c. 32.

were recognised, and the legal profession was opened. But there was then considerable delay, though in 1801 there were high hopes based on the prospect held out by Pitt to Catholics in Ireland of emancipation as a reward of union. George III. proved illogically hostile, on the invalid pretence of his coronation oath, which clearly could not be infringed by asserting to a toleration Act, and which he had far more clearly violated when he assented to the Quebec Act, 1774, endowing Roman Catholicism in Quebec; but in that case he was no doubt actuated by the desire to mobilise French Canada against his subjects in North America. At any rate the King in 1807 dismissed his ministry rather than listen to suggestions of concession (*i*). In 1813 and 1817 military and civil offices were thrown open, as already in Ireland in 1793, and in view of the pressure of the Catholic Association and the agitation in Ireland Wellington and Sir R. Peel secured Catholic emancipation in 1829, all offices save the Regentship, the Lord Chancellorship, and the Lord Lieutenantship of Ireland being opened as well as both Houses of Parliament, judicial offices save in the ecclesiastical Courts, and corporate offices, while a new oath was supplied (*k*). In 1851 (*l*) the taking of territorial titles by the Roman Catholic bishops was prohibited but ignored, and the Act was repealed in 1871 (*m*). The Lord Lieutenantship ceased to be closed to Roman Catholics when the Government of Ireland Act, 1920 (10 & 11 Geo. V., c. 67), was passed, and a Roman Catholic held the post until in December, 1922, new offices of Governor-General of the Irish Free State and Governor of Northern Ireland came into being. The slight remains of disabilities such as wearing of certain forms of dress in public were abolished in 1926 (*n*), and the prohibition of admitting Jesuits and monks kept alive in 1829, but never enforced, definitely disappeared.

**Nonconformist Disabilities.**—Under Elizabeth the only disabilities of Nonconformists were those of the Act of Uniformity imposing a penalty for non-attendance at church, which was enforced for a time fairly effectively, and an Act of 1593 (*o*) under which any person over sixteen who refused submission might be compelled to abjure the realm. The High Commission Court set up by Elizabeth under statutory authority, was active against Nonconformists, and, when that was swept away in 1641, under Clarendon a strict code was passed. The Corporation Act, 1661, required the taking of the sacrament as a condition of holding corporate office, thus striking at the power of the Presbyterians in the towns (*p*). The Act of Uniformity, 1662, re-established the Prayer Book and episcopal ordination, thus driving out the Presbyterian ministers who had been inducted during the Commonwealth (*q*). The Conventicle Act, 1664, broke up all save

(*i*) On the subject, see Walpole, *Hist. Eng.*, ii, 221—422. Cf. May, *Const. Hist.*, ii, 163—306.

(*k*) 10 Geo. IV. c. 7; for education and property, 2 & 3 Will. IV. c. 115; for minor points, 7 & 8 Vict. c. 102; 9 & 10 Vict. c. 59.

(*l*) 14 & 15 Vict. c. 60.

(*n*) 16 & 17 Geo. V. c. 55.

(*o*) 35 Eliz. c. 1. See Tanner, *Tudor Const. Doc.*, pp. 166, 182, 197 ff., 361.

(*p*) 13 Car. II. st. 2, c. 1.

(*m*) 34 & 35 Vict. c. 53.

(*q*) 14 Car. II. c. 4.

the church services (*r*), and the Five Mile Act, 1665, forbade all clergy who had not taken an oath of non-resistance under the Act of 1662 to reside within five miles of a corporate town (*s*). Charles II. would have included dissenters with Catholics in his desire for securing the latter immunity, but the former declined thus to receive favours. Under the Revolution, while the Act of Toleration, 1689, gave toleration to all persons who would take the oaths of allegiance and supremacy and sign a declaration against transubstantiation, ministers had to subscribe all save three and a half of the Thirty-nine Articles and to register their chapels (*t*). Roman Catholics and Unitarians (*u*) were expressly excluded, and nothing was done to open to dissenters offices in the State, or corporations, or the universities. Moreover, under Anne the Tories secured the Occasional Conformity Act, 1711, and the Schism Act, 1714, which were intended to prevent dissenters qualifying for office by occasional taking of the sacrament, and from keeping schools (*x*). These restrictions were swept away in 1718, and a limit of six months in lieu of three under the Test Act was allowed for taking the sacrament after admission to office (*y*). Moreover, annual Acts of Indemnity were normally passed to allow evasion of the Test and Corporation Acts, and a noteworthy decision of the Lords in 1759 (*z*) asserted that the dissenters' way of worship was permitted and innocent and lawful, so that the City of London could not pursue its habit of electing dissenters sheriffs and then fining them because they could not serve. In 1779 (*a*) any dissenter was permitted to teach and preach on declaring himself a Christian Protestant dissenter, while in Ireland civil and military offices were opened to Protestants. Efforts to secure repeal of the Test and Corporation Acts in 1787, 1789, and 1790 were ineffective, but in 1812 (*b*) dissenters were relieved from the oath and declaration of 1689 and 1779. Finally the Test and Corporation Acts were swept away in 1828 (*c*), a declaration "on the true faith of a Christian" replacing the sacramental test.

Minor grievances were introduced by Lord Hardwicke's Marriage Act, 1753 (*d*), which compelled dissenters to be married in the parish church; in 1836 registration of births, deaths and marriages was established, and authorisation was given to purely civil marriage, and marriage of dissenters in their own chapels before a registrar (*e*). Church rates, attacked from 1841, were made voluntary in 1868 (*f*). Dissenters were allowed their own religious services for interments in parish churchyards by Act of 1880 (*g*). The universities, closed to matriculants at Oxford, by requiring signature of the Thirty-nine

(*r*) 16 Car. II. c. 4. It terminated in 1665 and was re-enacted in 22 Car. II. c. 1.

(*s*) 17 Car. II. c. 2.

(*t*) 1 Will. & M. c. 18. The excepted Articles were 34—36 and part of 20.

(*u*) See also 9 Will. III. c. 32.

(*x*) 10 Anne, c. 6; 13 Anne, c. 7.

(*y*) 5 Geo. I. c. 4.

(*z*) *Chamberlain of London v. Allen Evans*, Parl. Hist., xiv, 313—327.

(*a*) 19 Geo. III. c. 44.

(*b*) 52 Geo. III. c. 155.

(*c*) 9 Geo. IV. c. 17.

(*d*) 26 Geo. III. c. 33.

(*e*) 6 & 7 Will. IV. cc. 85, 86.

(*f*) 31 & 32 Vict. c. 109.

(*g*) 43 & 44 Vict. c. 41. For the discreditable opposition to the Burials Bill of 1877 of Gathorne Hardy, see Monypenny and Buckle, ii, 1033 ff.

Articles since 1581, and on taking a degree at Cambridge in 1616, were effectively opened in 1871 (*h*). Commutation of tithes dates from 1836, and in 1936 tithe rent-charges were finally taken over by the State.

**Quakers.**—Quakers were specially favoured by the Toleration Act, 1689, allowed to affirm as witnesses (*i*), exempted from the Marriage Act, 1753, and they, with Moravians and Separatists were from 1833 allowed to sit in the Commons on affirmation (*k*).

**Unitarians.**—Unitarians were long denied any favour, they were excluded from the Toleration Act, made the object of feud legislation, but in 1774 the first Unitarian place of worship was opened. In 1792 the efforts of Mr. Fox to secure recognition were defeated by the bigotry of Mr. Burke and Mr. Pitt. In 1813 (*l*) their worship was recognised, and in 1836 they were given the benefits of the Marriage Act, 1836.

**Jews.**—Jews, excluded from England under Edward I., but allowed to return under the Commonwealth, were long excluded from naturalisation by the requirement of taking the sacrament (*m*). The cessation of Indemnity Acts after 1828 was made good by an Act of 1839 allowing the taking of the oath of allegiance on the Old Testament, and one of 1845 admitting them to corporations (*n*). In 1858—1866 Parliament was definitely thrown open (*o*).

The exact position of Christianity as part of the law of the land has been much discussed, but the issue is not seriously now in doubt that no illegality attaches to secularism or the reverent denial of the truth of Christianity (*p*). On the other hand, toleration has been extended to the legal recognition of what were once deemed superstitious practices, such as the bequest of money for masses for the souls of the dead (*q*).

(*h*) 34 & 35 Vict. c. 63.

(*i*) 7 & 8 Will. III. c. 34.

(*k*) 3 & 4 Will. IV. c. 49, 82; 1 & 2 Vict. c. 77, extended the privilege to ex-members of these sects.

(*l*) 53 Geo. III. c. 160. For 1792, see Parl. Hist., xxix, 1372.

(*m*) 7 Jac. I. c. 2; a limited exception in respect of colonial residence was allowed in 1739: 13 Geo. II. c. 7; the Jews Act, 1753 (26 Geo. II. c. 26), had to be repealed next session (27 Geo. II. c. 1.). The taking of the sacrament was abolished generally by 6 Geo. IV. c. 67.

(*n*) 1 & 2 Vict. c. 105; 8 & 9 Vict. c. 52.

(*o*) 21 & 22 Vict. c. 49; 23 & 24 Vict. c. 63; 29 Vict. c. 19.

(*p*) See *Bowman v. Secular Society*, [1917] A. C. 406.

(*q*) *Caus, In re*; *Lindeboom v. Camille*, [1934] Ch. 162; *contra, West v. Shuttleworth* (1835), 4 L. J. Ch. 115; *Heath v. Chapman* (1854), 23 L. J. Ch. 947.

## PART VIII.

### The Subject.

#### CHAPTER I.

##### ALLEGIANCE AND ALIENAGE.

**The Crown's Duty towards the Subject.**—The duty of the Crown towards the subject, which rested originally upon the feudal bond which required service and obedience from the subject as "liege subjects," in return for protection from the King as "liege lord," is now to be found expressed in the terms of the oaths which he is required to take before or at the coronation. The duties imposed by the coronation oath (the necessity for taking which is imposed by the Act of Settlement, 1701) are: (1) To govern according to the laws and customs of the kingdom. (2) To cause law and justice in mercy to be administered. (3) To maintain the laws of God, the true profession of the Gospel, and the Protestant reformed religion as by law established. (4) To maintain and preserve inviolably the settlement of the Church of England, and the doctrine, worship, discipline, and government thereof as by law established in England. (5) To preserve to the bishops and clergy of England, and to the churches committed to their charge, all rights and privileges which by law appertain to them. The form of the oath as now administered differs in two substantial points from the form prescribed by the Act for establishing the Coronation Oath, 1689 (*a*). The Sovereign is also bound by the Union with Scotland Act, 1707 (6 Anne, c. 11), to preserve the Presbyterian Church in Scotland, and a like obligation is imposed on any regent under the Regency Act, 1937 (1 Edw. VIII. and 1 Geo. VI. c. 16), s. 4 (1).

**Allegiance.**—The duty of allegiance is the direct outcome of the old feudal bond between the King and his people, as asserted in 1608 in *Calvin's Case* (*b*); it is due to the actual or *de facto* King in possession, independently of his right by inheritance, and his subjects are by the Treason Act, 1495 (*c*), bound to serve him in war and assist him against rebellion, and are protected in so doing from the consequences of

(*a*) *Ante*, p. 126. For the form of the oath administered in 1902, see Bodley's Coronation of Edward VII., p. 438.

(*b*) 7 Co. Rep. 1, 5 a.

(*c*) 11 Hen. VII. c. 1. The Act annuls future Acts contrary to it, a vain effort. "But things that do not bind may satisfy for the time": Bacon, Works, vi, p. 170. The Act vaguely suggests a possible difference between the person and office of the King. Cf. Keith, *The King and the Imperial Crown*, pp. 13 ff.

treason and all other penalties. It is due to the King both in his natural as well as in his kingly or regal capacity, as was ruled in the *Despencers' Case* (*d*). The relationship is personal, and at one time the right seems to have existed of recalling subjects from overseas by letters under the Great Seal (*e*), and there is authority for restraining subjects from leaving the realm in time of war by proclamation (*f*), though normally the subject is free to enter and leave, except when departure is prohibited by legal process (*g*). Thus in March, 1937, the Crown had no power to forbid a number of clergymen leaving England to investigate religious conditions in Spain, though they were refused any recommendation to the good offices of the British representatives therein. The King's duty to protect the subject overseas is a discretionary one in manner of exercise; if it is thought right to charge fees for the provision of military guards in British ships in foreign waters, such payment is valid without special Act of Parliament (*h*).

The duty of allegiance may be distinguished as natural, local, or acquired: (1) Natural allegiance is due from all natural-born British subjects who have not by statutory authority been freed from that status. (2) Local allegiance is due from all aliens while resident within the realm, whether their country is at amity with this country or not, but not from alien enemies invading the realm (*i*). (3) Acquired allegiance is due from persons (i) naturalized under the Naturalization Act, 1870, or the British Nationality and Status of Aliens Acts, 1914 to 1933 (*k*), or by private Act of Parliament, or (ii) made denizens by letters patent under the Great Seal, or by Act of Parliament, denization conferring some of the privileges of a British subject according to the terms of the grant. Unless born of English parents, however, a denizen is prevented by the Act of Settlement, 1701, from becoming a privy councillor, or a member of either House of Parliament, or from enjoying any office or place of trust, civil or military (*l*). Even, however, before the Naturalization Act, 1870, made aliens capable of receiving grants of land or holding land, he could hold land and exercise the franchise (*m*), and that Act removed the disability imposed in

(*d*) (1320), 1 St. Tr. 23. The Despencers (or Despensers) were banished for treating the King personally with asperity.

(*e*) On the other hand, the right to expel (save on process of outlawry) seems not to have existed: cf. *Broadfoot's Case* (1743), Post. 154. For recall, see *Bartue v. Duchess of Suffolk* (1560), Dyer, 176 a.; *Calvin's Case* (1608), 7 Co. Rep. 20 a.; *Case of Ship Money* (1637), 3 St. Tr. at p. 1059.

(*f*) 3 Co. Inst. 179. Possibly the right to recall still exists.

(*g*) By writ *ne exeat regno* under the Debtors Act, 1869, s. 6; *Colverson v. Bloomfield* (1885), 29 Ch. D. 341.

(*h*) *China Navigation Co. v. Att.-Gen.*, [1932] 2 K. B. (C. A.) 197. The sum raised is an appropriation in aid legitimately raised under the Public Accounts and Charges Act, 1891; see p. 398, *ante*.

(*i*) *Calvin's Case* (1608), 7 Co. Rep. 1, 6 a.

(*k*) The Naturalization Act, 1870, is repealed as from January 1, 1915, by the British Nationality and Status of Aliens Act, 1914, and naturalization must as from that date be effected under the latter Act and its amendments.

(*l*) 12 & 13 Will. III. c. 2, s. 3. This provision also applied to persons naturalized, but was impliedly repealed to that extent by the Naturalization Act, 1870, and is now expressly so repealed by s. 3 (2) of the British Nationality and Status of Aliens Act, 1914 (4 & 5 Geo. V. c. 17); *R. v. Speyer*, [1916] 2 K. B. 858.

(*m*) *Solomon's Case* (1804), 2 Peck. 117. The Parliamentary ban was common law: *Monmouth Election Case* (1624), Glanv. El. Cas. 120.

1701 of receiving a Crown grant. He can now own a British ship if he has taken the oath of allegiance and remains while owner resident in the royal dominions or partner in a firm carrying on business therein (*n*); (iii) persons being nationals of conquered or ceded territory usually acquire British nationality if they continue therein resident (*o*).

**The Definition of British Subjects.**—At common law (*Calvin's Case* (1608)) and by statute (British Nationality and Status of Aliens Acts, 1914 to 1933), natural-born British subjects include all persons born within the King's dominion and allegiance (including persons born on board a British ship whether in foreign territorial waters or not) whatever their parentage (*p*). The following persons are also British subjects:—

- (1) By the British Nationality and Status of Aliens Acts a person born out of His Majesty's dominions whose father was a British subject and who fulfilled any of the following conditions, that is to say, if either (i) his father was born within the British dominions or within the King's allegiance, *i.e.*, in a place like China where the Crown still exercises extra-territorial jurisdiction, or (ii) his father was a person who had a certificate of naturalization, or (iii) his father had become a British subject by annexation of territory, or (iv) his father was at the date of birth in the service of the Crown, or (v) his birth was registered at a British consulate within a year or in special circumstances two years, or in the case of a person born after January 1, 1915, who would have been a British subject if born before that date, within twelve months after August 1, 1922 (*q*). A person whose British nationality depends upon registration at a consulate ceases to be a British subject unless he asserts his nationality by declaration within a year (*r*), and if permitted to do so by the foreign law renounces his foreign allegiance.
- (2) Aliens who have become naturalized British subjects after five years' residence in the British dominions, the last year being

(*n*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 1. For his position as to airships, see Convention for the Regulation of Aerial Navigation, 1919, Art. 7, given legal force under the Air Navigation Act, 1920 (10 & 11 Geo. V. c. 80), s. 1.

(*o*) *Gout v. Cimitian*, [1922] 1 A. C. 105. See Keith, *Theory of State Succession*, pp. 42—48.

(*p*) British Nationality and Status of Aliens Act, 1914 (4 & 5 Geo. V. c. 17), s. 1 (1) (a), (c). Persons born on foreign ships within British territorial waters are not to be deemed British subjects by reason only of the ship being in such waters at the time of their birth (*ib.* s. 1 (2)); and except as otherwise provided nothing in s. 1 is to affect the status of persons born before January 1, 1915, the commencement of the Act (*ib.* s. 1 (3)), which will therefore remain as at common law (*Calvin's Case* (1608)), or as previously affected by the British Nationality Acts, 1730 and 1772, and the Naturalization Act, 1870.

(*q*) British Nationality and Status of Aliens Act, 1922, s. 1. Whether born before or after August 7, 1914, the child of a British subject is to be deemed to be born within the King's allegiance if born in a place where by treaty, grant, usage, sufferance, or other lawful means His Majesty exercises jurisdiction over British subjects (4 & 5 Geo. V. c. 17), s. 1. This provision has been widely misunderstood: see Dicey and Keith, *Conflict of Laws*, pp. 152, 153.

(*r*) 12 & 13 Geo. V. c. 44, s. 1.

in the United Kingdom, or after five years' service under the Crown, under the British Nationality and Status of Aliens Act, 1914, or under the rather more limited provisions of the Naturalization Act, 1870, and who enjoy the status and privileges of natural-born British subjects (*s*). An applicant for naturalization must be of good character and know English. From January 1, 1934, under an amending Act of 1933 (23 & 24 Geo. V. c. 49), the wife of an alien who is naturalized does not become a British subject unless within twelve months she makes a declaration of desire to acquire British nationality.

A certificate of naturalization under the Act of 1914 may, if the Secretary of State thinks fit on the application of the alien, include the names of children of the alien born before the date of the certificate, and being minors and not already British subjects. Within one year of obtaining their majority such children may make a declaration of alienage (*t*).

A person naturalized under either Act may make a subsequent declaration of alienage if a subject of a state with which a convention has been made to that effect, when he ceases to be a British subject (*u*).

- (3) The wife of a British subject is herself a British subject, and the wife of an alien an alien. But where the husband ceases to be a British subject, the wife may make a declaration retaining her British nationality (*x*), and the wife of an alien enemy, if she was at birth a British subject, may, by grant at his discretion of a certificate of naturalization by the Secretary of State, resume her British nationality (*y*). It is, however, provided by the Act of 1933 that (i) a woman's loss of her British nationality on marriage shall be conditional on her attaining by marriage the nationality of her husband; and (ii) that she shall not lose her nationality, if her husband after marriage becomes an alien, unless she also acquires his new nationality, but within twelve months of acquiring such nationality she may declare her desire to retain British nationality.

- (4) Any persons naturalized by Act of Parliament, or who have acquired British nationality by reason of annexation of

(*s*) 33 & 34 Vict. c. 14, s. 7; 4 & 5 Geo. V. c. 17, ss. 2, 3 (1). The former Act is repealed by the latter as from January 1, 1915, after which date naturalization must therefore be effected under the latter Act. By s. 5 (2) of the latter, the Secretary of State may grant certificates to minors.

(*t*) 4 & 5 Geo. V. c. 17, s. 5 (1). Under the Naturalization Act, 1870, s. 10 (2), (4), the child of parents whose father or widowed mother was re-admitted to British nationality or became a naturalized British subject (provided the child was an infant at the time of naturalization, and afterwards became resident with its parents in the United Kingdom) became a British subject. This provision (*semble*) still applies to a child of persons naturalized before January 1, 1915. Cf. *Carlebach's Case*, [1915] 3 K. B. 716.

(*u*) 33 & 34 Vict. c. 14, ss. 3, 7; 4 & 5 Geo. V. c. 17, s. 15.

(*x*) 4 & 5 Geo. V. c. 17, s. 10.

(*y*) 8 & 9 Geo. V. c. 38, s. 2 (5).

territory, *e.g.*, subjects of the Boer Republics or of Turkey in Cyprus (*a*).

- (5) The children or grandchildren born abroad before January 1, 1915, of a British subject, subject to certain conditions.

**Loss of British Nationality.**—A person born within the King's dominions and allegiance, or on a British ship, if at the time of his birth or during minority he became also a subject of a foreign State, and not being under any disability, may divest himself of his British nationality by a declaration made under the provisions of the British Nationality and Status of Aliens Act, 1914, but such a declaration is ineffective during war, whether the declarant's foreign nationality is enemy (*b*) or neutral (*c*), to relieve the declarant from liability to military service accrued before the declaration. And under the same Act, persons who, though born out of the King's dominions, are British subjects may (if not under disability) make a similar declaration without any such condition as to foreign nationality (*d*).

Under the same Act a British subject who becomes voluntarily, while in a foreign State, a naturalized subject of that State thereby divests himself of his British nationality (*e*).

He cannot, however, by becoming a naturalized subject of an enemy's country, in time of war, divest himself of the duty of allegiance, so as to be able to commit acts of treason with impunity (*f*). But a woman loses her nationality, even in war, by marriage with an enemy alien (*g*). Naturalization in a neutral country is not forbidden during war, even if the naturalized person acts in a hostile manner (*h*). But a person naturalized during war in an enemy country suffers the disadvantage of the nationality thus assumed for property purposes (*i*).

It was held in *Calvin's Case* (*k*) that Scotsmen, born after the accession of James I. to the English throne, were citizens of both England and Scotland, and that Englishmen born after the same date were citizens of Scotland as well as of England. On the separation

(*a*) *Campbell v. Hall* (1774), 1 Cowp. 204; *Gout v. Cimitian*, [1922] 1 A. C. 105. The Crown decides in the absence of legislation—what persons are to be deemed converted into British subjects by annexation. For South Africa, see Act No. 14 of 1932, s. 1, which covers certain cases where nationals of the former Republics left the territory before annexation and so did not acquire British nationality.

(*b*) *Freyberger, Ex parte*, [1917] 2 K. B. 129.

(*c*) *Vecht v. Taylor* (1917), 116 L. T. 446; *Dawson v. Meuli* (1918), 118 L. T. 357; *Gschwind v. Huntington*, [1918] 2 K. B. 420.

(*d*) 4 & 5 Geo. V. c. 17, s. 14 (1), (2). Previously to this enactment similar declarations by persons born in the British dominions could be made under s. 4 of the Naturalization Act, 1870.

(*e*) 4 & 5 Geo. V. c. 17, s. 13. Where a person ceases to be a British subject, his children also being minors cease to be British subjects, unless they do not become by the law of another country naturalized in that country (*ib.* s. 12 (1)); 8 & 9 Geo. V. c. 38, s. 7A. And where a British subject ceases to be a British subject he is not thereby discharged from any obligation, duty, or liability in respect of acts done before he ceased to be a British subject (*ib.* s. 16).

(*f*) *R. v. Lynch*, [1903] 1 K. B. 444; *Gschwind v. Huntington*, [1918] 2 K. B. 420.

(*g*) *Fasbender v. Att.-Gen.*, [1922] 2 Ch. 850. This is now subject to the Act of 1933, s. 1; see p. 428, *ante*.

(*h*) *Johnstone v. Pedlar*, [1921] 2 A. C. 262.

(*i*) *Chamberlain's Settlement, In re*, [1921] 2 Ch. 533. Cf. *Kramer v. Att.-Gen.*, [1923] A. C. 528.

(*k*) (1608), 7 Co. Rep. 1; 2 St. Tr. 559.

of the kingdoms of the United Kingdom and Hanover, allegiance to the British Crown was held to have ceased (*l*). It does not appear that British subjects were nationals in Hanover. Similarly, on the successful revolt of the United States, citizens of that country became aliens (*m*), though British subjects who fought for the King and left the States remained British (*n*).

By the British Nationality and Status of Aliens Act, 1918, the Secretary of State may revoke a certificate of naturalization where its continuance is not conducive to the public good, if the holder has shown himself disloyal, or has traded with the enemy, or was not of good character at the date of the certificate, or has been sentenced to not less than twelve months' imprisonment within five years of the certificate. Under the Act of 1914 he can revoke a certificate obtained by fraud or misrepresentation.

By the Act of 1914, s. 8, the Government of India and of any self-governing Dominion can grant certificates of naturalization on like conditions with Imperial validity; this right has been extended in 1937 to British Burma, but a similar grant by other British possessions must be confirmed by the Secretary of State (*o*).

**The Status of Aliens.**—The position of aliens in England has normally been fairly satisfactory, but common law forbade them to hold land, or fill offices, or possess civic rights. Magna Carta (c. 41) gave them liberty of entry, residence, and departure, save that in war they could be detained in order to secure the safety of English merchants abroad. By 32 Hen. VIII. c. 16, aliens were forbidden to rent either a shop or a residence. Expulsion of aliens was possible, being last practised in 1575. Restriction of immigration otherwise than in time of war was started under the Aliens Act, 1905. Drastic steps were taken necessarily during the war, under the Aliens Restriction Act, 1914 (*p*), and the prerogative. The right to intern enemy aliens was asserted (*q*) and their procedural disabilities determined (*r*). The Courts upheld the widest discretion of the executive to expel aliens though neutral or allied (*s*).

In 1919 (*t*) the Act of 1914 was in some measure continued, and an elaborate code of regulations was enacted by Order in Council in 1920 (*u*), later amended, the Act of 1905 being repealed but partly incorporated.

(*l*) *Isaacson v. Durant* (1886), 17 Q. B. D. 54.

(*m*) *Doe d. Thomas v. Acklam* (1824), 2 B. & C. 779.

(*n*) *Auchmuty v. Mulcaister* (1826), 5 B. & C. 771.

(*o*) In places where another language than English is official, knowledge of it can be accepted in lieu of English, e.g., French in Quebec and Canada generally, Afrikaans in the Union of South Africa. For Burma, see S. R. & O., 1937, No. 230, p. 973.

(*p*) 4 & 5 Geo. V. c. 12.

(*q*) *R. v. Knockaloe Camp Commandant; Forman, Ex parte* (1917), 87 L. J. K. B. 43.

(*r*) *Porter v. Freudenberg*, [1915] 1 K. B. 857.

(*s*) *Sarno, Ex parte* (1916), 86 L. J. K. B. 62; *Duc de Chateau-Thierry's Case*, [1917] 1 K. B. 922; *Sacksieder's Case* (1918), 87 L. J. K. B. 608; *Venicoff's Case*, [1920] 3 K. B. 72.

(*t*) 9 & 10 Geo. V. c. 92.

(*u*) Orders in Council, March 25, December 3, 1920; March 12, 1923; July 24, 1925; August 11, 1931. For the strict application of the Orders, see *Chajutin v. Whitehead*, [1938] 1 K. B. 506.

Provision is made for control of immigration; aliens can only land at specified ports, and may be excluded on various grounds of unsuitability in character or health, or lack of means to support themselves and their dependants; permits granted to the employer by the Ministry of Labour, who regulates entry and duration in view of the labour market, are necessary in case of persons otherwise suitable if under engagement for service in the United Kingdom. Persons who have been guilty of extradition offences, or against whom an expulsion order has been made, are excluded. Provision is likewise made for the registration of resident aliens (with an exception since 1933 for British-born wives of aliens), and for the deportation of aliens convicted of crime and recommended by the Court for deportation; or reported to have been within twelve months of entry in receipt of parochial relief; or to have been living in insanitary conditions; or to have been convicted in a foreign country of an extradition offence (*x*); or whose removal is considered conducive to the public good by the Secretary of State. His power of deportation need not be exercised on the advice of the Advisory Committee which he may consult, and cannot be restrained by the Courts (*y*).

Otherwise aliens have as a rule under statute property and personal rights similar to those of British subjects. But they have no political rights as regards office or the franchise, local or parliamentary, cannot be owners of British ships (*z*), or British aircraft, cannot, save in a few cases, hold pilotage certificates or act as master or chief officer of a merchant vessel or as skipper or second hand of a fishing boat, nor can they be members of the civil service (*a*). There are restrictions on change of name (*b*), and special penalties are provided for efforts to cause sedition or disaffection in the forces or the civil population, or unrest in industry (*c*). Nor may an alien sit on a jury if challenged (*d*). Registers and trade circulars must show the nationality of alien directors and managers of companies (*e*).

In time of war aliens, subjects of the enemy power, become liable, as noted above, to be treated as prisoners of war, and cannot sue without royal licence, express or implied (*f*). If sued, however, they can appeal (*g*). Trade with all persons, even British subjects, on enemy territory become illegal (*h*), and contracts with such persons are suspended (*i*).

(*x*) Order in Council, 1920, ss. 12, 13. Power is given to place the deportee on any ship, which then must receive him.

(*y*) *Venicoff's Case*, [1920] 3 K. B. 72; *Bressler, Ex parte* (1924), 88 J. P. 89; *Sugarman, Ex parte* (1922), 127 L. T. 27; *R. v. Kakelo*, [1923] 2 K. B. 793.

(*z*) 4 & 5 Geo. V. c. 17, s. 17. For aircraft, see p. 427, note (*n*), *ante*.

(*a*) 9 & 10 Geo. V. c. 92, s. 6. They appear ineligible as priests in the Church of England. But aliens may be ordained in England for service outside under 24 Geo. III. sess. 2, c. 35 (passed consequent on the recognition of the independence of the American colonies).

(*b*) 9 & 10 Geo. V. c. 92, s. 7; *Bunning v. Kollross*, [1923] 1 K. B. 311; *Ernest v. Met. Police Commr.* (1919), 89 L. J. K. B. 42.

(*c*) 9 & 10 Geo. V. c. 92, s. 3.

(*d*) 9 & 10 Geo. V. c. 92, s. 8.

(*e*) 19 & 20 Geo. V. c. 23, ss. 144 (1), 145.

(*f*) *Porter v. Freudenberg*, [1915] 1 K. B. 857.

(*g*) *Ib.*

(*h*) *Bousmaker, Ex parte* (1806), 13 Ves. 71.

(*i*) *Ertel Bieber & Co. v. Rio Tinto Co.*, [1918] A. C. 260.

**The Status of Women.**—The position of women, subjects and aliens, corresponds with that of men in matters of constitutional law, though, as above noted, the nationality of the husband often determines that of the wife. Political rights of women subjects were long denied by common law, despite occasional instances of their exercise in mediæval times (*k*). The franchise was conceded in part by the Representation of the People Act, 1918, and in full by the Representation of the People (Equal Franchise) Act, 1928; membership was given by the Parliament (Qualification of Women) Act, 1918 (*l*). The Sex Disqualification Removal Act, 1919 (*m*), permits women to hold all kinds of public office, central and local, to be magistrates or judges, to exercise any public function, to serve as jurors, to be admitted to any incorporated society, and, subject to rules, to the civil service (*n*), and to be admitted as solicitors. They are still excluded from certain churches in the capacity of priest, *e.g.*, the Church of England, the Church of Scotland, and the Roman Catholic Church, and, rather illogically, it has been decided that a peeress in her own right cannot sit in the House of Lords (*o*).

The extension of the right of women to retain British nationality on marriage, which has been granted in Australia and New Zealand was discussed at the Imperial Conference of 1937, but without agreement (*p*).

(*k*) *Chorlton v. Lings* (1869), L. R. 4 C. P. 374.

(*l*) 7 & 8 Geo. V. c. 64; 18 & 19 Geo. V. c. 12; 8 & 9 Geo. V. c. 47.

(*m*) 9 & 10 Geo. V. c. 71.

(*n*) See p. 196, *ante*.

(*o*) *Case of Lady Rhondda*, [1922] 2 A. C. 339.

(*p*) Cmd. 5482, p. 28. It is clearly irrational to multiply cases of double nationality, and if conceded the net result must be a demand for recognition of British nationality of children. Identity of interest between spouses should be a feature of marriage, not divided allegiance.

## CHAPTER II.

## THE RIGHTS OF THE SUBJECT.

**The Basis of the Rights of the Subject.**—The liberties of the subject rest on the two principles: (1) that the subject may say or do what he pleases so long as he does not infringe the substantive law or the rights of others; and (2) that public authorities can do only what is permitted by common law or statute (*a*). Hence, apart from the principles of the four great statutes (*b*) regulating the relations of the Crown and people, there is no special code of fundamental rights. But the lack of such definition is made good by the strong popular opinion in favour of the rights of the subject, which allows only in war invasion of these rights, and declined, even in the Emergency Powers Act, 1920, to give the executive power to impose military or industrial conscription or to forbid striking (*c*).

The protection of the liberties is due to (1) the high development of the action of trespass (*d*); (2) the use of the prerogative writs, now orders, including that of *habeas corpus*; (3) the right to have jury trial in serious crimes or common law actions, especially those involving false imprisonment or malicious arrest; (4) the rule of equal liability to the jurisdiction of the Courts of all persons save the Crown, with the limited exceptions above noted (*e*); and (5) the rule of construction that statutes are so to be interpreted as not to interfere with the vested rights of the subject (*f*). Of not less importance is the activity of the Press and of public opinion which will take up eagerly any perversion of justice, as may be seen from its reaction to the comparatively venial concealment of the name of the wife of a metropolitan magistrate summoned for a trivial motoring offence.

The rights secured are essentially: (1) personal freedom; (2) security of property; (3) freedom of speech; (4) right of public meeting; and (5) right of association. This last right includes that of striking, *i.e.*, of combined withholding of labour where there is no breach of contract or tort or crime. There has been noted above the right to the observance of natural justice in all legal proceedings (*g*).

(*a*) "The law of England is a law of liberty": *R. v. Cobbett* (1804), 29 St. Tr. 1, at p. 49, *per* Lord Ellenborough. Thus a certain right of self-defence is allowed: *R. v. Hussey* (1925), 18 Cr. App. Cas. 160; apparently a man assaulted in his own home may shoot the attacker if need be.

(*b*) P. 8, *ante*.

(*c*) 10 & 11 Geo. V. c. 55, s. 2 (1).

(*d*) An award of damages though high is upheld if a constitutional principle is at stake: *Huckle v. Money* (1763), 2 Wils. 205.

(*e*) See p. 33, *ante*.

(*f*) *Metropolitan Asylums District v. Hill* (1881), 6 App. Cas. 193, at p. 208.

(*g*) See p. 223, *ante*. It is curious that two breaches of this elementary principle that a man should not be judge in his own case usually pass unnoticed: (1) the right of the Postmaster-General to refuse compensation for theft of money in the post, despite registration; (2) the presence in the House of Lords or Privy Council of the Lord Chancellor even when the action of the Government is attacked: *Marais* (*D. F.*), *Ex parte*, [1902] A. C. 109; *Sammut v. Strickland*, [1938] A. C. 678.

(1) *The Right to Personal Freedom.*

The right to personal freedom means that no man may be punished, imprisoned, or coerced, except for a breach of the law proved in a legal manner before an ordinary tribunal, and this right flows directly from the provisions of Magna Carta, the Petition of Right, 1628, and the Bill of Rights, 1689 (*h*). The latter enactment, by declaring the Court of High Commission, which James II. had endeavoured to re-establish under the name of the Commissioners for Ecclesiastical Causes, to be illegal, put an end for ever to the attempts of the Crown to set up Courts where men might be tried in an uncertain and arbitrary manner, and which had proved such a fertile source of tyranny in the case of the Star Chamber. The present ecclesiastical Courts exercise a limited and very carefully safeguarded authority over clerics. It is true that at the present day a soldier, or sailor, or airman may be tried and punished by court-martial for certain offences; but the jurisdiction of the military, naval or air force Courts is strictly limited by statute, and is controlled by the civil Courts by means of the writs, now orders, of prohibition and *certiorari*. Moreover, the officers who sit upon a court-martial, if they exceed their jurisdiction, are liable to indictment at the suit of the party injured for assault, false imprisonment, manslaughter, or murder, and may be sued civilly for damages (*i*).

**Arrest.**—Liberty is safeguarded by the prohibition of arrest save under legal authority, normally a magisterial warrant. Such a warrant may not be general; that was established in the cases affecting arrests with a view to suppressing alleged libels of seditious character, as will be noted below (*k*). To this rule various necessary exceptions as to general search have been made by statute, but the principle holds. But a police constable may arrest on reasonable suspicion of felony, to prevent a breach of the peace, and when a breach has been committed and on many other occasions, under the Prevention of Crimes Act, 1871, the Larceny Act, the Offences against the Person Act, and the Malicious Injuries to Property Act. He may enter private premises in which a meeting is in progress to protest against the Incitement to Disaffection Bill, where he believes an offence, such as seditious utterance or breach of the peace is imminent (*l*), and, if he apprehends and seeks to prevent a breach, and gives an instruction that no person shall address a meeting in a certain place, to make an address is illegal as obstructive (*m*). But, while police officers may enter on premises to make enquiries, if asked to go out, they become trespassers if they fail so to do (*n*). Further, the Court will carefully confine the actions of the police under the Vagrancy Act,

(*h*) See p. 9, *ante*.

(*i*) See p. 355, *ante*; *Jenkins v. Shelley* (1939), 55 T. L. R. 508.

(*k*) See p. 448, *post*. Common law, perhaps, allowed search for stolen goods.

(*l*) *Thomas v. Sawkins*, [1935] 2 K. B. 249. H. J. Laski, *Parl. Govt.*, p. 377, contrasts the Home Secretary's defence of police inaction during the very undesirable Fascist proceedings at Olympia in 1934.

(*m*) *Duncan v. Jones*, [1936] 1 K. B. 218.

(*n*) *Davis v. Lisle*, [1936] 2 K. B. 435.

1824 (o). A private person may arrest for felony with impunity, and on suspicion of felony, if one has been committed, and in many cases of offence against himself or his servants, for offences against the Larceny and Coinages Acts, under the Malicious Injuries to Property Act, or breach of the peace. But detention is much limited by provision for grant of bail by police (p) or magistrates, or on their refusal by a High Court judge, and even after conviction on appeal bail often is available, and must be reasonable.

**Safeguards for Personal Freedom.**—The chief safeguard, however, for the liberty of the subject lies in the legal remedies which have been provided in case of its infringement, for self-defence is of limited extent. Of these the remedies by (1) criminal information which, under the Administration of Justice (Miscellaneous Provisions) Act, 1938 (s. 12), can only be filed *ex officio* by the Attorney-General, (2) indictment, or (3) a civil action for damages for false imprisonment or malicious prosecution are a means of obtaining redress for an injury already committed; but the principal remedy for false imprisonment or illegal detention of the subject's person is the writ of *habeas corpus*, which, in a proper case, puts an end to the imprisonment or detention itself.

**The History of Habeas Corpus.**—The origin of the writ of *habeas corpus* is not wholly clear. Old writs which might be of service were those *de odio et atia*, already mentioned (g), which was, however, obsolete by the eighteenth century, that of *mainprize*, which was, ruled obsolete in *Jenks' Case*, and as late as 1736 is recorded the use of that *de homine replegiando*, which was analogous to the replevin of goods, both addressed to the sheriff. But the ordinary writ of *habeas corpus* (r) was merely a step in progress securing the presence of a prisoner if on bail or in custody before the Court for trial, or of a jurymen. It was also used by the Courts at Westminster to interfere with the proceedings of credits of cities and local franchises. It seems to have often been used to compel reluctant defendants to appear to answer issues and to mark the royal expansion of justice in the thirteenth century. In the fourteenth and fifteenth centuries it was used as ancillary to the writ of privilege which was used by each Court to protect its officers from unfair treatment in rival Courts, the plea being that he was needed in his own Court for official duties (s). In the sixteenth century the writ is used by the Courts to test the validity of imprisonment by the newer prerogative Courts

(o) *Ledwith v. Roberts*, [1937] 1 K. B. 232. It must be noted that a police officer has independent statutory powers of arrest without warrant: cf. *Fisher v. Oldham Corporation*, [1930] 2 K. B. 364. The power to bind over a man to keep the peace or be of good behaviour is very wide and its due exercise depends on magisterial discretion, but in *Lansbury v. Riley*, [1914] 3 K. B. 229, and *R. v. Sandbach; Williams, Ex parte*, [1935] 2 K. B. 192, that discretion seems to have been wisely exercised. Cf. p. 460, *post*.

(p) 10 Geo. IV. c. 44; 42 & 43 Vict. c. 49, s. 38. See p. 292, *ante*, and p. 436, *post*.

(g) See p. 317, *ante*.

(r) *Jenks*, *Select Essays in Anglo-American Legal History*, ii, 531—548. See also Fox, L. Q. R., xxxix, 46; Cohen, *Can. Bar Rev.*, xvi, 92 ff.

(s) This may explain the fact that the writ could not be secured easily in vacation.

or executive officers, and by this time all pretence of the applicant being a Court official is dropped (*t*). The writ, however, was not effective against imprisonment by royal command (*u*), and, though this should have been remedied by the Long Parliament (*x*), the case of *Jenks* proved that, if the Crown desired to detain, the Courts might easily make difficulties in the long vacation in granting the writ (*y*). Public indignation secured the passing of the Habeas Corpus Act, 1679, which (1) secures the issue of the writ in vacation; (2) penalises any person neglecting to make a return or shifting the place of confinement; (3) forbids recommittal for the same offence on penalty of £500; (4) requires issue by Chancery and Exchequer as well as King's Bench and Common Pleas, with liability in £500 on any judge refusing the writ; and (5) forbids imprisonment overseas (*z*). The Act failed to deal with illegal civil detention, and left it possible to demand excessive bail and to evade the process by a false return, *prima facie* valid. The Bill of Rights, 1689, forbade excessive bail (*a*), and an Act of 1816 remedied the other defects (*b*). From January 1, 1939, for other writs was substituted, by the Administration of Justice (Miscellaneous Provisions) Act, 1938 (s. 7), an order, but this is not extended to *habeas corpus*, to which the older precedents still apply.

**The Writ of Habeas Corpus ad subjiciendum.**—This “principal bulwark of English liberty” is an order issuing as a rule from the King's Bench upon affidavit, either of the prisoner himself or of some other person, showing probable grounds for supposing that a case of false imprisonment exists. The writ is addressed to the person in charge of the prisoner, directing him to produce his body before the King's Bench in order that the Court may inquire into the reason for his detention. If the cause of his detention is insufficient, the prisoner is entitled to be set at liberty, or released on bail in cases of misdemeanour. In cases of treason or felony, if not admitted to bail, which is at the discretion of the Court, the prisoner is kept in custody; but he is entitled to be put on trial at the next sessions, unless the delay is occasioned by the inability of witnesses for the prosecution to attend, and even then must be discharged if not tried at the following sessions.

Under the Act of 1862 (*c*) no *habeas corpus* is to issue out of England into any colony or foreign dominion of the Crown, where there is a Court having authority to issue the writ and ensure its execution (*d*). Nor is there jurisdiction to issue the writ directed to a person out of

(*t*) *Search's Case* (1588), 1 Leon. 70; *Howell's Case*, *ib.* 71.

(*u*) See p. 202, *ante*.

(*y*) (1676), 6 St. Tr. 1189—1208.

(*x*) 16 Car. I. c. 10, s. 8.

(*z*) 31 Car. II. c. 2.

(*a*) See also Bail Act, 1898 (61 & 62 Vict. c. 7); Criminal Justice Administration Act, 1914 (4 & 5 Geo. V. c. 58), s. 23; justices who refuse bail must inform the accused in case of misdemeanour of his rights to apply to the King's Bench Division: *R. v. Phillips* (1922), 38 T. L. R. 897.

(*b*) 56 Geo. III. c. 100.

(*c*) 25 & 26 Vict. c. 20. Resentment had been caused in Canada on the score of the issue of a writ.

(*d*) *R. v. Crewe (Earl)*; *Sekgome, Ex parte*, [1910] 2 K. B. 576.

the jurisdiction (*e*). The writ, however, runs to the Channel Islands and to the Isle of Man. In cases of emergency, such as serious riot or rebellion (*f*), the Habeas Corpus Acts are sometimes suspended by Act of Parliament, as has been done on several occasions (*g*); but it is usual for Parliament to pass an Act of indemnity for acts done during the suspension (*h*). Where a writ has been sued out, the modern practice is either to move the Divisional Court, or to apply by summons to a King's Bench Division judge sitting in chambers (*i*). An order for issue may then be made, but normally, in the absence of urgency, a rule *nisi* is made, and a summons is served on the respondent, on the hearing of which the writ issues or is withheld.

The writ should be addressed to the person who has actual control of the body, but it may be addressed to the person who has ordered the detention (*k*). The return to the writ may be impeached by affidavit (*l*), but a technical inaccuracy in the return may be made good by production of a correctly framed warrant or order (*m*).

No appeal lies from an order granting or refusing the writ in a criminal matter (*n*), nor from an order to discharge from custody (*o*). But, where the issue is the custody of an infant, appeal lies from an order granting or refusing a writ (*p*). Where there is no actual criminal charge, *e.g.*, detention of a native chief under an Ordinance (*q*), appeal lies from refusal to grant; but not from an order of discharge (*r*), nor from an order for the issue of the writ determining the illegality of the detention of a prisoner, though not ordering immediate discharge (*s*). But he who applies unsuccessfully for the issue of the writ may apply from Court to Court until he reaches the highest tribunal in the land (*t*). As each judge has jurisdiction to order the writ to issue, he must hear the application on its merits, notwithstanding that some other judge has already refused a similar application. The applications need not be to different Courts (*u*).

(*e*) *R. v. Pinckney*, [1904] 2 K. B. 84.

(*f*) Thus in 1715 the Act was suspended by 1 Geo. I. st. 2, c. 8; in 1745 by 19 Geo. II. c. 1, speedy trial being ensured by the common law Courts by c. 9; for indemnification, see 1 Geo. I. st. 2, c. 39; 19 Geo. II. c. 20. For the gross abuses under Pitt and Sidmouth, see May, *Const. Hist.*, ii, 130—136.

(*g*) See 34 Geo. III. c. 54; 57 Geo. III. c. 3; freely in Ireland, 11 & 12 Vict. c. 35; 29 & 30 Vict. c. 1; 44 & 45 Vict. c. 4.

(*h*) For example, see 41 Geo. III. c. 66; 58 Geo. III. c. 5; Indemnity Act, 1920, and Restoration of Order in Ireland (Indemnity) Act, 1923.

(*i*) Crown Office Rules, 1906, r. 216.

(*k*) *Home Secretary v. O'Brien*, [1923] A. C. 603.

(*l*) *Canadian Prisoners' Case* (1839), 3 St. Tr. (N. S.) 963. This case shows that, where, if released, prisoners would at once be re-arrested on valid grounds, they will not be discharged on a technicality.

(*m*) *R. v. Richards* (1844), 5 Q. B. 926. Cf. *R. v. Allen* (1860), 30 L. J. Q. B. 38.

(*n*) *Woodhall, Ex parte* (1888), 20 Q. B. D. 832; *Savarkar, Ex parte*, [1910] 2 K. B. 1056.

(*o*) *Cox v. Hakes* (1890), 15 App. Cas. 506; *Maguire, Ex parte* (1925), 95 L. J. K. B. 55.

(*p*) *Barnardo v. McHugh*, [1891] A. C. 388; *Barnardo v. Ford*, [1892] A. C. 326.

(*q*) *R. v. Crewe (Earl)*, [1910] 2 K. B. 576.

(*r*) *Cox v. Hakes, ubi supra*.

(*s*) *Home Secretary v. O'Brien*, [1923] A. C. 603.

(*t*) *Ib.*

(*u*) *Eshugbayi Eleko v. Government of Nigeria*, [1928] A. C. 459.

In cases under the Extradition Acts the application should, except in vacation, be to a Divisional Court by summons to show cause why an order *nisi* for the writ should not issue (*x*), and *habeas corpus* will lie if the magistrate has usurped a jurisdiction he does not possess, but, probably, not merely to review his decision on the merits, whether of fact or law (*y*), though in a doubtful case the Home Secretary may use his statutory power to refuse extradition.

There are, of course, many legal grounds of detention which may render *habeas corpus* unavailing, such as detention of a child by a parent or guardian, or under a Court order in an industrial school, &c., detention under an order of a lunatic, or of persons suffering from certain infectious diseases or habitual drunkards, as well as committal to prison for trial or after conviction in ordinary criminal cases. But as early as 1772 the process was effective to terminate the holding in England of negroes in slavery (*z*), and it has been used to assert a woman's right to personal freedom or her control over an illegitimate child as against the father or others (*a*), or to secure to parents their rights over children detained in orphanages (*b*). Under war conditions legislation may, without suspending Habeas Corpus Acts, provide adequate grounds for detention, normally indefensible, such as hostile origin and associations (*c*), and an interned enemy cannot be released on *habeas corpus*. A warrant to search for women alleged to be detained for immoral purposes or for neglected children may on due cause be granted.

### *Martial Law.*

**Meaning of Term.**—As the state of things prevailing under what is known as *martial law* forms an exception to the general rule that no man may be punished or imprisoned except for a breach of the law proved in a legal manner before an ordinary tribunal, it becomes necessary to consider what martial law is, and how far it is admitted by the laws of England.

Martial law in this sense must be clearly distinguished from (1) the law applied to soldiers, airmen or sailors, for the maintenance of discipline in military Courts under the Army Act, in Air Force Courts under the Air Force Act, and in naval Courts under the Naval Discipline Act (*d*); (2) the rules, subject to the principles of international law, laid down by the Government and its officers to govern the conduct of its forces in war, or in occupation of enemy territory or of territory

(*z*) Crown Office Rules, 1906, r. 219; *Shure, Ex parte*, [1926] 1 K. B. 127.

(*y*) *R. v. Brixton Prison*, [1924] 1 K. B. 455; *R. v. Vyner*, 68 J. P. 142, at p. 143, *per* Lord Alverstone; *R. v. Brixton Prison (Governor)*; *Bidwell, Ex parte*, [1937] 1 K. B. 305.

(*a*) *Sommerset's Case* (1772), 20 St. Tr. 1.

(*b*) *R. v. Jackson*, [1891] 1 Q. B. 671 (wife); *Carroll, In re*, [1931] 1 K. B. 317.

(*c*) *Barnardo v. Ford*, [1892] A. C. 326.

(*d*) *R. v. Halliday; Zadiq, Ex parte*, [1917] A. C. 260. For lunacy, see *Harnett v. Bond*, [1925] A. C. 669, and the discussion in *Shipman v. Shipman* (1938), 55 T. L. R. 273.

(*e*) 1 Will. & M. sess. 2, c. 4, and the Petition of Right, 1628, leave it obscure if we can accept the view taken in Finlason's Comm., p. iii, n.: "But the Mutiny Acts are only necessary to apply in time of peace those regulations which the Crown may by prerogative apply in time of war or rebellion which amounts to war."

of which annexation has been declared but which still is under military control (*e*). The Petition of Right (*f*) denounces the use of commissions of martial law against civilians, as well as against soldiers, and since the first Mutiny Act (*g*) there has been a clear technical distinction between military law under that measure and martial law as describing the exceptional methods used to suppress insurrection, whether in peace or as ancillary to war operations.

**The Right to Suppress Disorder.**—There can be no doubt of the common law right of the Crown, its servants, and all subjects, to take steps essential to meet emergencies dangerous to the State (*h*); it is not probable that the Crown can override rights merely in anticipation of emergency (*i*) apart from its rights to requisition shipping in emergency (*k*). What is dubious is whether, in addition to the common law right, there should be accepted a special prerogative authorising the employment of martial law tribunals to the exclusion of the civil Courts, a state of affairs akin to the French *état de siège*, which is fully recognised by the French Constitution, and on the declaration of which civil jurisdiction is handed over to the military tribunals (*l*). The matter is hardly important, and as regards England there is happily no authority, though there is Irish, Dominion and Colonial authority, and martial law has been exercised freely in India, especially in 1919 in the Punjab with grave results for British prestige in that country. In Palestine a most drastic system of martial law is in operation under excessively wide powers conferred by Orders in Council of 1931 and 1936 (S. R. & O., 1936, Nos. 1058 and 1059), and of 1937 (No. 225), under which the most objectionable practice of punishing innocent persons by collective fines and of destroying the property of innocent persons is operative.

**Extent of Right.**—All public officers and citizens are under obligation to use so much force as is necessary for the suppression of insurrection, riot, or rebellion, even to the extent of taking human life. A person will be criminally liable if, as was said by Littledale, J., in *R. v. Pinney* (*m*), the prosecution of the Mayor of Bristol for negligence in suppressing the riots of October, 1831, "he has not done all that could reasonably be expected from a man of ordinary prudence, firmness, and activity, under the circumstances in which he was

(*e*) Hale, Common Law, pp. 34 ff., distinguishes between the law as to prisoners of war and that as to military discipline, both of which belonged to the constable and marshal, together with appeals of death or murder committed overseas. Cf. Keith, Const. Hist. First British Emp., pp. 40, 120. The Duke of Wellington's dictum that "Martial law meant no law at all" really refers to control of enemy or occupied areas: 115 Hansard, 3 s., 880, 881. See Wheaton, International Law (ed. Keith), ii, 783 ff.

(*f*) 3 Car. I. c. 1.

(*g*) 1 Will. & M. sess. 2, c. 4.

(*h*) *R. v. Hampden* (1637), 3 St. Tr. 826, at pp. 975, 1011, 1012, 1013, 1162; *R. v. Nelson and Brand* (1867), Cockburn's Charge, 59, 85.

(*i*) As suggested by Lord Cozens-Hardy, M.R., *Petition of Right, In re*, [1915] 3 K. B. 649, at p. 659. That case was settled by paying compensation (1916), 32 T. L. R. 699.

(*k*) *The Broadmayne*, [1916] P. (C. A.) 64.

(*l*) Dicey, Law of the Const., pp. 283—288.

(*m*) (1832), 3 B. & Ad. 947. Cf. *R. v. Gillam* (1768), Clode, ii, pp. 630—635.

placed" (n). In such circumstances the measure of a man's right to use force is correlative to his duty; he will be criminally and civilly liable for acts (o) done in excess of his duty, and for acts done, e.g., by way of punishment after the emergency is over (p), and, on the other hand, he will be liable for omissions of duty amounting to criminal negligence.

The duty of the military force to aid the civil power on such occasions, though at first questioned, is now beyond doubt; normally they act only on a requisition by a magistrate, but may act independently in emergency. In a proper case a *nolle prosequi* will be entered to prevent criminal proceedings being brought, but normally reliance is placed on the fairness of juries (q).

The commands of a superior are no justification for unnecessary or excessive violence, unless the command is not necessarily or manifestly illegal, though in time of actual war the command of a superior officer might be held an absolute justification for all acts done, whether manifestly illegal or not. The better opinion is that a soldier acting under the orders of his superior officer is justified unless the orders be manifestly illegal (r).

**Martial Law Courts and the Prerogative.**—The difficult question which arises is concerned with the issue of jurisdiction of civil and martial law Courts respectively. (1) How far can civil Courts operate during insurrection or war? (2) What is the real nature of martial law Courts? Can they sentence to terms of imprisonment valid after the expiration of insurrection or war? (s). Nothing can be gathered from cases of declaration of martial law by statute, as in Ireland in 1799 (t), but only from Irish cases in 1798, in the Cape and Natal in 1899—1908, and in the Irish struggles from 1916 to 1923.

It is open to argue that a prerogative to proclaim martial law in war exists. (1) The Petition of Right, 1628, may be interpreted, as

(n) And see the comments of Blackburn, J., thereon in *R. v. Eyre* (Finlason's Rep., p. 57).

(o) *Wright v. Fitzgerald* (1799), 27 St. Tr. 759, 765. This liability is not barred by an Act of Indemnity unless it is couched in extravagantly wide terms.

(p) *Wolfe Tone's Case* (1798), 27 St. Tr. 613. Lord Camden had issued Orders in Council, March 30, May 24, 1798, to establish martial law. Statute was resorted to March 25, 1799: 39 Geo. III. c. 11.

(q) Clode, ii, 131—155, 615—654. In the case of the so-called Boston Massacre of 1770 the jury showed this fairness: Keith, Const. Hist. First Brit. Empire, p. 365.

(r) *Per Willes, J.*, in *Keighly v. Bell* (1886), 4 F. & F. at p. 790; and see Forsyth, p. 216; *R. v. Smith* (1900), 17 Cape S. C. Rep. 561. See also the Royal Commission's report on Mr. Sheehy Skeffington's case, Cd. 8376; in that case three civilians were murdered in cold blood by Capt. Bowen-Colthurst, who was found guilty but insane by court-martial; it was made clear that military authorities were negligent in control of subordinates, but, despite the warning, on April 13, 1919, a large number of Indians were massacred at Amritsar, an outrage which was inadequately punished and gravely and permanently undermined the moral basis of British rule in India: see Cmd. 534, 681, 705 (1920); Chisol, India, Old and New, pp. 177 ff. Those proceedings in Palestine in 1938—39 show the same error of excessive repression, and a prosecution of four men for the murder of a helpless Arab prisoner proved ineffective.

(s) See opinion of Mr. Serjeant Spankie quoted by Forsyth at p. 211: "Courts-martial which condemn to imprisonment and hard labour belie the necessity under which alone the jurisdiction of courts-martial can lawfully exist in civil society."

(t) 39 Geo. III. c. 11 (Irish Act).

by Lord Halsbury (*u*), not to condemn martial law commissions except in peace, but as Blackburn, J., pointed out, this does not mean that it sanctions them (*x*). (2) An Irish statute providing for statutory action refers to "the acknowledged prerogative of His Majesty for the public safety to resort to the exercise of martial law against open enemies or traitors" (*y*). But the value of such references is gravely lessened by the invariable practice of indemnifying action done during martial law (*z*). (3) It has been held judicially to exist and to be subject to limitation by statute (*a*), but the case is not very satisfactory. There is no authority that sentences could, without subsequent legislation, be enforced after the cessation of martial law. Indeed, the martial law Courts seem essentially to be no Courts at all, existing as Courts neither by statute nor common law (*b*). Their proceedings, therefore, are executive and defensible by necessity alone (*c*).

**The Jurisdiction of Civil Courts under Martial Law.**—The rule on this subject has been laid down by the Privy Council in a rather unsatisfactory judgment (*d*) arising out of a proclamation in the Cape threatening rebels with punishment of death, penal servitude, imprisonment and fine to be inflicted by military Courts convened by authority of the Commander-in-Chief. Under it Mr. Marais was arrested and detained by the chief constable under a military warrant. Mr. Marais presented a petition to the Supreme Court of Cape Colony, alleging that his arrest and imprisonment were illegal, and asking to be liberated. Buchanan, J., refused the application on the grounds that martial law had been proclaimed in the district; that the Court ought not to go into the necessity for that proclamation; and that the Court could not exercise jurisdiction as long as martial law lasted. Mr. Marais petitioned the Privy Council for special leave to

(*u*) *Marais (D. F.)*, *Ex parte*, [1902] A. C. 109; 3 Car. I. c. 1.

(*x*) *R. v. Eyre*, Finlason's Rep. 73.

(*y*) 39 Geo. III. c. 11; 41 Geo. III. c. 104 (British); 43 Geo. III. c. 117 (British) 3 & 4 Will. IV. c. 4. In 1865 martial law in Jamaica rested on an Act of 1844. Cf. Olivier, *The Myth of Governor Eyre* (1933). Similar language was used in Statutes of Lower Canada, but the law officers, in 1838, held that the language had no sense beyond the rule of common law.

(*z*) *E.g.*, Cape Acts, No. 6 of 1900; No. 4 of 1902; and on several occasions in Natal and the Union: see the Indemnity and Undesirables Deportation Act, 1914; Indemnity and Special Tribunals Act, 1915; Indemnity and Trial of Offenders Act, 1922. Cf. the Indemnity Act, 1920 (10 & 11 Geo. V. c. 40). For Ceylon, in 1848, see Mills, *Ceylon under British Rule*, pp. 183—202.

(*a*) *Egan v. Macready*, [1921] 1 Ir. R. 265, *per* O'Connor, M.R., relying on 10 & 11 Geo. V. c. 31, as limiting action by the executive.

(*b*) *Clifford and O'Sullivan, In re*, [1921] 2 A. C. 570. Hence the Cape Supreme Court refused to order bail for a martial law prisoner: *R. v. Gildenhuys* (1900), 17 Cape S. C. Rep. 266, 269. See also *Johnstone v. Pedlar*, [1921] 2 A. C. 262, 294, *per* Lord Sumner.

(*c*) This view has several times been expressed by the Colonial Secretary, *e.g.*, as regards martial law in Canada in 1837—38, St. Vincent in 1862, the Cape of Good Hope in 1836, 1846—47 and 1850—53. It was justified on this score in Ceylon in 1848, and in Demerara in 1823—24. Cf. Clode, ii, 481—510. In 1867 Lord Carnarvon disapproved any colonial legislation to authorise a declaration of martial law (as in Jamaica and Antigua), insisting on reliance on Acts of Indemnity: *ib.* pp. 666, 667.

(*d*) *Marais (D. F.)*, *Ex parte*, [1902] A. C. 109. See also in respect of martial law during a native rebellion in Natal, *Tilonko v. Att.-Gen. of Natal*, [1907] A. C. 93, 461; Keith, *The Dominions as Sovereign States*, p. 559.

appeal from the order of the Supreme Court, on the grounds: (1) that he had committed no crime; (2) that if he had he should have been arrested and tried according to law; (3) that the civil Courts were open for his trial; and (4) that his arrest, deportation, and confinement were illegal. The Privy Council's refusal of leave to appeal was based on the following doctrine: "The only ground susceptible of argument urged by the learned counsel was, that whereas some of the Courts were open it was impossible to apply the ordinary rule that where actual war is raging the civil Courts have no jurisdiction to deal with military action, but where acts of war are in question, the military tribunals alone are competent to deal with such questions. . . . That question came before the Privy Council as long ago as the year 1830, in *Elphinstone v. Bedreechund* (e) . . . Lord Tenterden in giving judgment said: 'We think the proper character of the transaction was that of hostile seizure made, if not *flagrante*, yet *nondum cessante bello*, regard being had both to the time, the place, and the person, and consequently that the municipal Court had no jurisdiction to adjudge upon the subject.' . . . Doubtless cases of difficulty arise when the fact of a state of rebellion or insurrection is not clearly established. It may often be a question whether a mere riot or disturbance, neither so serious nor so extensive as really to amount to a war at all, has not been treated with an excessive severity, and whether the intervention of the military force was necessary; but once let the fact of *actual war* be established, and there is an universal consensus of opinion that the civil Courts have no jurisdiction to call in question the propriety of the action of military authorities. The framers of the Petition of Right knew well what they meant when they made a condition of peace the ground of the illegality of unconstitutional procedure."

The value of the last doctrine is, as already noted, dubious, but the case does not decide in any way that military tribunals are Courts, or can enforce sentences after the withdrawal of such law, and, as has been seen, the Cape sentences were all confirmed, after revision by a commission, under a local Act (f), and the same rule of indemnification was followed in 1914, 1915 and 1922 in the Union of South Africa.

The doctrine of *Marais' Case* was freely followed in Ireland, when the British forces were confronted with rebellion (g), and also later when the Irish Free State Government was confronted with resistance (h). It was made clear that that Government could use its provisional forces to put down opposition as part of the inherent right of self-defence appertaining to every Government.

(e) (1830), 1 Knapp. 316. The case is not very closely in point. It concerns the seizure of property of an alien enemy in a case of conquest, and belongs to the doctrine of act of State; see p. 39, *ante*. The judgment was notoriously not unanimous, and the Lord Chancellor was the legal adviser of the Government whose orders were attacked.

(f) No. 4 of 1902, s. 5 (1) (Cape of Good Hope Act).

(g) *R. v. Allen*, [1921] 2 Ir. R. 241 (form of notice, p. 261); *R. (Garde) v. Strickland*, [1921] 2 Ir. R. 317; *R. (Ronayne and Mulcahy) v. Strickland*, *ib.* 333.

(h) *Johnstone v. O'Sullivan* [1923] 2 Ir. R. 13; *R. (Childers) v. Adjutant-General of Provisional Forces*, [1923] 1 Ir. R. 5.

But it is for the civil Courts to decide whether a state of war exists justifying the application of armed force or martial law (*i*), though *prima facie*, if the Court can only sit under guards, such a state exists (*k*). After war the Courts can act and investigate trespass to property or person, if not indemnified by statute (*l*).

## (2) *The Right to Property.*

The right of the subject to property is protected against the world by writs of trespass, notably those of trespass *quare clausum fregit* and of trespass *de bonis asportatis*. Against the Crown the subject had to struggle against arbitrary taxation. He had to secure the regulation of the feudal dues by Magna Carta and to combat the enforcement by Charles I. of all feudal claims, *e.g.*, the compelling of tenants in chivalry to receive knighthood or pay a fine, and the extension of the demand to all men of full age seised of lands or rents of any tenure of the annual value of £40 or more, the extension of the forests of the Crown, and the allegation of defective titles to estates (*m*). The abolition of feudal tenures in chivalry under Charles II. terminated this source of claim (*n*).

Other modes of exaction such as benevolences or forced loans (*o*) or monopolies (*p*) or imposition of customs duties (*q*) have also been successfully met, and the protection of property made adequate. It is secured even against the Crown's freedom from liability to suit, for a petition of right clearly lies against the Crown for any property retained improperly by the Crown or its officers (*r*).

The strength of the sentiment of property is seen in the feeling in the American colonies that taxation was unconstitutional without representation, which was a really living sentiment (*s*). It explains the rule of the United States Constitution against even legislation in the States in breach of contract. In English politics it showed itself in the grave reluctance of Parliament to interfere, despite gross abuses and sovereignty issues, with the franchise of the East India Company (*t*); in the proposal of Pitt to pay for the deprivation of owners of pocket boroughs of their control and in the actual payments for the extinction of constituencies on the Union of Ireland and Great Britain (*u*); in the payment of £20,000,000 to extinguish slavery, which survived far too long because of the sense of the sanctity of property; and in the grant of compensation for excess prices illegally paid for military commissions in 1871 (*x*). In the same way compensation for taking property under the Lands Clauses Consolidation

(*i*) *R. (Garde) v. Strickland*, [1921] 2 Ir. R. 329; *R. v. Allen*, *ubi supra*.

(*k*) *R. (Childers) v. Adjutant-General*, *ubi supra*.

(*l*) *Higgins v. Willis*, [1921] 2 Ir. R. 386; *R. (O'Brien) v. Military Governor*, [1924] 1 Ir. R. 32.

(*m*) Clarendon, *Hist. Civil Wars*, i, 84, 85.

(*n*) See 12 Car. II. c. 24.

(*p*) See p. 204, *ante*.

(*q*) *Bucknall v. R.* (1930), 46 T. L. R. 449.

(*s*) Keith, *Const. Hist. First Brit. Empire*, pp. 353—358, 361—365.

(*t*) Cf. (1767) *Complete Protests*, ii, 69—76.

(*u*) £1,260,000 was paid: Cornwallis, *Corr.*, iii, 323.

(*x*) May, *Const. Hist.*, iii, 276, 277.

(*o*) See p. 336, *ante*.

(*q*) See p. 202, *ante*.

Act, 1845 (8 & 9 Vict. c. 18), the Railways Clauses Consolidation Act, 1845 (c. 20), the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), and the Towns Improvement Clauses Act, 1847 (c. 34), was fixed on an over-generous scale, now reduced to more moderate rates under the Acquisition of Land (Assessment of Compensation) Act, 1919 (9 & 10 Geo. V. c. 57), which has been applied to taking of land under the Housing Acts from 1925, the Restriction of Ribbon Development Act, 1935, and other Acts.

The respect for property, has, however, on occasion run to unreasonable lengths, above all in the obvious sympathy of judges with ingenious devices to enable wealthy people to restrict their liability to pay income and sur-tax (*y*). This is much to be deprecated; in times of severe burden of expenditure in State interests, wealth should accept taxation loyally, not throw burdens on the poorer classes.

On the other hand, grave powers of interference with private rights have been given by the action authorised to set up marketing boards for natural products, which have, however, where abused, been limited by the House of Lords (*z*), and the town planning legislation authorises interference with property, but in the main with generous compensation. The Wheat Commission in like manner will not be allowed by by-law to exclude intervention by the Courts (*a*).

### (3) *The Right to Freedom of Speech.*

This right covers that of the liberty of the Press and of conscience, and is in effect the fact that any person may say, write or publish what he pleases so long as he does not bring himself within the law relating to (1) slander or defamatory libel, or (2) blasphemous, (3) obscene, or (4) seditious words written or spoken.

*False defamatory words*, if spoken, constitute a slander; if written and published, a libel; and words are defamatory when they are "calculated to convey an imputation on the plaintiff injurious to him in his trade, or holding him up to hatred, contempt, or ridicule" (*b*). These terms may be too narrow, but bad manners and discourtesy are not actionable (*c*). For both slander (*d*) and libel, a person is liable to be mulcted in damages at the suit of the party injured, whilst a libel calculated to create a breach of the peace is, though not published to a third party (*e*), a misdemeanour at common law, punish-

(*y*) *Inland Revenue Commrs. v. Westminster (Duke)*, [1936] A. C. 1; *Inland Revenue Commrs. v. Levene*, [1928] A. C. 217, 227, *per* Lord Sumner.

(*z*) *Ferrier v. Scottish Milk Marketing Board*, [1937] A. C. 126.

(*a*) *Paul, Ltd. v. Wheat Commission*, [1937] A. C. 139.

(*b*) *Per* Lord Blackburn in *Capital and Counties Bank v. Henty* (1882), 7 App. Cas. p. 771. For application to an advertisement, see *Tolley v. Fry & Sons*, [1931] A. C. 333. A talking cinematograph is not slander, but libel: *Youssouppoff v. Meiro-Goldwyn-Mayer Pictures, Ltd.* (1934), 50 T. L. R. 581.

(*c*) *Sim v. Stretch* (1936), 53 T. L. R. 669 (House of Lords).

(*d*) In slander it is necessary to prove special damages except in three cases: (1) for words imputing unchastity to a girl or woman: *Slander of Women Act*, 1891 (54 & 55 Vict. c. 51); (2) for words imputing crime or contagious or infectious disease; (3) for words disparaging another in the way of his office, profession, or trade: *Jones v. Jones*, [1916] 2 A. C. 481; *De Stempel v. Dunkels*, [1938] 1 All E. R. 238.

(*e*) *R. v. Adams* (1888), 22 Q. B. D. 66.

able by fine and imprisonment on information or indictment. In proceeding by criminal information, the leave of a judge of the King's Bench Division was necessary (*f*). Under the Administration of Justice (Miscellaneous Provisions) Act, 1938, this rule disappears and no information can be brought save *ex officio* by the Attorney-General. In proceeding by indictment against a newspaper, the leave of a judge in chambers was provided for (*g*).

Occasionally also the dissemination of a libel may be restrained by injunction.

In a large number of cases defamatory statements are privileged, e.g., in judicial proceedings (*h*), if made in Parliament (*i*), State communications between and by government departments (*k*), reports in pursuance of military duty or proceedings at courts-martial or military enquiries (*l*), fair reports of contemporary judicial proceedings (*m*), and documents published by authority of Parliament (*n*). In these cases privilege is absolute. In others it is qualified, and may be displaced by proof of malice; such are communications made in the course of legal, social, or moral duty (*o*); statements in self defence (*p*); communications based on common interest (*q*); reports of judicial proceedings not covered by statute (*r*), if accurate, unbiased and published *bonâ fide*; faithful reports of Parliamentary debates; fair comment on matters of public interest (*s*); fair and accurate reports of proceedings of public meetings, official or otherwise, and of documents published at governmental request (*t*). The reports of the decisions of a domestic tribunal are not privileged (*u*).

The Press profits by the defence of apology and absence of malice and gross negligence combined with payment into Court (*x*), and a defendant may mitigate damages by proof that the plaintiff has received compensation from other sources (*y*). A journalist guilty of

(*f*) 4 Will. & M. c. 18, s. 1, repealed 1 & 2 Geo. VI. c. 63, s. 12, and Sch.

(*g*) Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 8.

(*h*) Cf. *Royal Aquarium Co. v. Parkinson*, [1892] 1 Q. B. 451, and p. 36, *ante*.

(*i*) See p. 69, *ante*. A communication to a M.P. of a complaint by a constituent against a public official in the constituency is privileged in the absence of malice, not absolutely: *R. v. Rule*, [1937] 2 K. B. 375, following *Harrison v. Bush* (1855), 25 L. J. Q. B. 25, and distinguishing *Hebditch v. McIlwaine*, [1894] 2 Q. B. 54.

(*k*) *Isaacs & Sons v. Cook*, [1925] 2 K. B. 391.

(*l*) *Dawkins v. Rokeby* (1875), 7 H. L. 544 (a rather unsatisfactory result). See p. 357, *ante*.

(*m*) *Kimber v. Press Assocn.* (1893), 62 L. J. Q. B. 152; *Ponsford v. Financial Times* (1900), 16 T. L. R. 248.

(*n*) See p. 74, *ante*.

(*o*) *Watt v. Longsdon*, [1930] 1 K. B. 130; *Stuart v. Bell*, [1891] 1 Q. B. 530. See p. 444, note (*c*), *ante*.

(*p*) *Koenig v. Ritchie* (1862), 3 F. & F. 413.

(*q*) See note (*o*); *Hunt v. G. N. Ry.*, [1891] 2 Q. B. 191.

(*r*) 51 & 52 Vict. c. 64, s. 3. There is no absolute privilege for proceedings of an administrative tribunal, e.g., the Court of Referees: *Collins v. H. Whiteway & Co.*, [1927] 2 K. B. 378; cf. Report on Ministers' Powers, Cmd. 4060, p. 113. For the ambit of privilege in reporting court proceedings to cover an interruption by a non-party, see *Farmer v. Hyde*, [1937] 1 K. B. 728. A report to a Labour Exchange is not absolutely privileged: *Mason v. Brewis Bros., Ltd.* (1938), 2 All E. R. 420.

(*s*) *Wason v. Walter* (1868), L. R. 4 Q. B. 73.

(*t*) 51 & 52 Vict. c. 64, s. 4. Cf. *De Normanville v. Hereford Times, Ltd.* (1936), 80 S. J. 423.

(*u*) *Chapman v. Ellesmere*, [1932] 2 K. B. 431.

(*x*) R. S. C., Ord. XXII. r. 1.

(*y*) 51 & 52 Vict. c. 64, s. 6.

writing a libel may be tried summarily, if the libel is criminal, and fined up to £50 (z).

A person may also be proceeded against criminally for libel if the offence falls within certain statutes. By Lord Campbell's Act, 1843 (a), it is a misdemeanour punishable by fine or imprisonment to publish, or to threaten to publish, or to offer to prevent the publication of a libel in order to extort money (b); or maliciously to publish a defamatory libel knowing the same to be false (c), or without knowing the same to be false (d). By the Larceny Act, 1861 (e), it is a felony to send a letter demanding money without probable cause (f); or to accuse, or threaten to accuse, another of certain crimes with intent to extort money (g).

Besides being defamatory, words may also be blasphemous, seditious, or obscene; and such words, if written and published or if spoken in the hearing of others, are a misdemeanour at common law, punishable by fine or imprisonment on indictment or criminal information.

*Blasphemy* is the speaking, or writing and publishing, of profane words vilifying or ridiculing God, Jesus Christ, the Holy Ghost, the Old and New Testaments, or Christianity in general, with intent to shock and insult believers, or to pervert or mislead the ignorant and unwary (h). But it is no longer blasphemy nor contrary to the policy of the law soberly and reverently to examine and question the truth of Christian doctrines (i). In theory Christians are liable to punishment if they deny the truth of the Christian religion, or the Holy Scriptures or their divine authority (k), and heresy equally might in theory be punished like adultery and fornication in ecclesiastical Courts. But profane and common swearing is no longer normally punished.

*Obscene* words are such as are calculated to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands such matter is likely to fall. It is not necessary that there should be proved intent to corrupt public morals. Matter may be *prima facie* obscene, but it may legally be published if it is for the public good as being necessary or advantageous to religion, science, literature or art, provided that the manner and the extent of publication does not exceed the requirements of the public good (l). Power is exercised by the Postmaster-General to stop in the post transmission of indecent matter, and it is a misdemeanour to send

(z) 44 & 45 Vict. c. 60, ss. 4, 5.

(b) 6 & 7 Vict. c. 96, s. 3.

(d) *Ib.* s. 5.

(f) *Ib.* s. 44.

(g) *Ib.* ss. 46, 47. And see the Corrupt and Illegal Practices Prevention Act, 1895 (58 & 59 Vict. c. 40), with regard to publishing false statements of fact in relation to a person's character at an election.

(h) See G. D. Nokes, *History of the Crime of Blasphemy* (1928); *R. v. Gott* (1922), 16 Cr. App. R. 87.

(i) *Shore v. Wilson* (1842), 9 Cl. & F. 355, at p. 539; and see the judgment of Coleridge, C.J., in *R. v. Ramsay and Foote* (1883), 48 L. T. 733, at p. 739; *Bowman v. Secular Society*, [1917] A. C. 406.

(l) *Per Cockburn, C.J.*, in *R. v. Hicklin* (1868), L. R. 3 Q. B. at p. 317; *R. v. Barracrough*, [1906] 1 K. B. 201; *R. v. De Montalk* (1932), 23 Cr. App. Cas. 182; *R. v. Bradlaugh* (1878), 3 Q. B. D. 569.

(a) 6 & 7 Vict. c. 96.

(c) *Ib.* s. 4.

(e) 24 & 25 Vict. c. 96.

(k) 9 Will. III. c. 35.

indecent matter by post, to exhibit for sale indecent matter, to write indecent words on buildings, &c., and a search warrant may be granted to search for indecent matter exposed for sale (*m*). The publication in regard to judicial proceedings generally of indecent medical details calculated to injure morals, and in regard to divorce proceedings of any save certain particulars (names, charges, legal arguments, summing-up and result) is forbidden (*n*).

*Seditious* words are such as tend to bring into hatred or contempt or to excite disaffection against the person of His Majesty, his heirs or successors, or the Government and Constitution of the United Kingdom, as by law established, or either House of Parliament. Or to excite His Majesty's subjects to attempt the alteration of any matters in Church or State as by law established otherwise than by lawful means (*o*); or to raise discontent or disaffection amongst His Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects (*p*).

Words, if written and published, may also amount to treason, or treason felony, if they fall within certain statutes (*q*). Whether defamatory words in any civil case do or do not constitute a libel was always a question for the jury to decide, and this rule was extended to criminal cases by Fox's Libel Act (*r*). But, when the judge is satisfied that the publication cannot be a libel, he is justified in withdrawing it from the cognisance of the jury (*s*).

What is meant by the right to freedom of discussion, then, in England, is that a man may say or publish what he pleases with impunity, so long as he does not fall within the law under the above general outlines (*t*).

Special powers are given for search—reasonably safeguarded—for certain types of seditious documents calculated to seduce members of the defence forces from their allegiance by the Incitement to Disaffection Act, 1934 (24 & 25 Geo. V. c. 56).

**The Freedom of the Press.**—This was not always the case, for during the fifteenth century after the inventing of printing the Press fell under censorship, and after the Reformation in the sixteenth century the

(*m*) 33 & 34 Vict. c. 79; 47 & 48 Vict. c. 43; 52 & 53 Vict. c. 18; 20 & 21 Vict. c. 83, s. 1; 8 Edw. VII. c. 48, s. 16.

(*n*) Judicial Proceedings (Regulation of Reports) Act, 1926 (16 & 17 Geo. V. c. 61). So also Summary Procedure (Domestic Proceedings) Act, 1937 (1 Edw. VIII. & 1 Geo. VI. c. 58), s. 3; Children and Young Persons Act, 1933 (23 & 24 Geo. V. c. 12), ss. 39, 49.

(*o*) Blasphemous and Seditious Libels Act, 1819 (60 Geo. III. & 1 Geo. IV. c. 8), s. 1; *R. v. Burns* (1866), 16 Cox, 355; *R. v. Fussell* (1848), 6 St. Tr. (N. S.) 723; *R. v. Vincent* (1839), 3 St. Tr. (N. S.) 1037; *R. v. Collins* (1839), 9 C. & P. 456. Earlier, the mere criticism of the Government was criminal, even in the view of Holt, L.C.J.: *R. v. Tutchin* (1704), 14 St. Tr. 1128. Cf. p. 448, note (*z*), *post*. The doctrine is repudiated by Lord Camden: *Entick v. Carrington* (1765), 19 St. Tr. 1020; but in *Drakard's Case* (1811), 31 St. Tr. 495, Wood, B., ruled that discussion of Parliament was illegal. Cobbett in 1804 and 1809 was condemned for libel, but in 1831 he was acquitted. See, for the more modern view, *R. v. Aldred* (1909), 22 Cox, 1.

(*p*) Stephen, Dig. of Crim. Law, Art. 93.

(*q*) 25 Edw. III. c. 2; 36 Geo. III. c. 7; 11 & 12 Vict. c. 12, s. 3.

(*r*) 32 Geo. III. c. 60; Parl. Hist., xxix, 551—602.

(*s*) *Cox v. Lee* (1869), L. R. 4 Ex. 284.

(*t*) As to sedition by aliens, see Aliens Restriction (Amendment) Act, 1919 (9 & 10 Geo. V. c. 92), s. 3.

Crown claimed the monopoly of all presses by virtue of the prerogative, and no one could print except by special licence. The Privy Council by Ordinance under Mary made possession of heretical books rebellion, punishable by martial law. In 1557 the exclusive right of printing and publishing was thus held by ninety-seven stationers, who formed themselves into the Stationers' Company, with power to seize all publications by persons not belonging to their guild (*u*).

In addition to this restriction, the Star Chamber claimed the regulation of all Press matters, and Press offences were tried by that Court without a jury and heavy penalties inflicted, as in the case of John Stubbe in 1579, who was mutilated for a pamphlet against the suggested marriage of the Queen with the Duke of Alençon. In 1566 an Order of Council in the Star Chamber was directed against seditious books. In 1585 a regular system of Press censorship was established by the Star Chamber, and no book could be published unless previously read over and licensed by various authorities, the Archbishop of Canterbury, Bishop of London, or the judges. London, Oxford and Cambridge alone could have printing presses (*x*).

The restriction on the number of printing presses eventually broke down. But the rules as to the licensing of books before publication were made more stringent in 1637, though this did not prevent the issue of more than 30,000 newspapers and pamphlets between 1640 and 1660, despite the continuation by the Long Parliament of efforts to repress all royalist literature. Milton's plea for freedom was disregarded and the control was put upon a statutory basis by the Licensing Act, 1662 (*y*), the licensing authorities being the judges for law books, a Secretary of State for politics and history, the earl marshal for heraldry, and the archbishop or bishop or the university heads. When the Act expired in 1679 the judges declared it criminal to publish anything as to the Government in praise or in censure without royal licence (*z*), thus destroying for a time the Press. In 1685 the Act was renewed and continued to 1693, but the Commons in 1695 refused any prolongation, and the Press multiplied and gained in influence through the writings of Addison and Bolingbroke, Swift and Steele.

The criticism of the Press was met by the imposition of a stamp duty under Anne (1712), extended to pamphlets in 1819 (*a*); it was lowered in 1836 and abolished in 1855, and the duty on paper removed in 1861. More serious was the use of the doctrine of libel, which was the cause of the issue of general warrants authorised in 1662 by Act, which lapsed in 1695, to arrest authors and search for papers, both being declared illegal (*b*). The Courts held (1) that falsehood was

(*u*) See Odgers' *Libel and Slander*, pp. 11 ff.

(*x*) Tanner, *Tudor Const. Doc.*, pp. 245, 279 ff.; Macaulay, *Hist. Engl.*, i, 53.

(*y*) 14 Car. II. c. 33.

(*z*) *Harris' Case* and *Carr's Case* (1680), 7 St. Tr. 929, 1127.

(*a*) 60 Geo. III. & 1 Geo. IV. c. 8.

(*b*) *Wilkes v. Wood* (1765), 19 St. Tr. 1153; *Leach v. Money*, *ib.* 1001; *Entick v. Carrington*, *ib.* 1030. By statute search warrants can be obtained to recover papers under the Official Secrets Act, 1911 (1 & 2 Geo. V. c. 28), s. 9; under the Incitement to Disaffection Act, 1934 (24 & 25 Geo. V. c. 56), s. 2 (on authority only of a High Court judge); to search in premises for stolen goods (*Jones v. German*, [1896] 2 Q. B.

not essential to guilt; (2) that publication by a servant was conclusive of his master's guilt; (3) that the criminality of a libel was for the Court, and the only method by which the jury could save an accused was by finding him not guilty (c), a right given by Fox's Libel Act, 1792. In the war period and that of repression an Act of 1819 (60 Geo. III. and 1 Geo. IV. c. 8) authorised even banishment for a second offence of seditious libel, a penalty repealed in 1830 (11 Geo. IV. and 1 Will. IV. c. 73). The accused was allowed by Lord Campbell's Act of 1843 to prove the truth of the libel and that it was to the public advantage to publish it, and the liability of the publisher was lessened by allowing him to prove lack of knowledge and authority and absence of carelessness on his part (d).

A previous licence is therefore no longer required for any publication, but by the Theatres Regulation Act, 1843 (e), the Lord Chamberlain may forbid the acting or representing of any play or part of a play, for the preservation of good manners, decorum, and of the public peace (f), and by Lord Campbell's Act (g) the magistrates are empowered to seize all the stock at the publisher's and bookseller's and prevent the further issue of any copies of books proved to be obscene.

Identification of the party responsible for libel is facilitated by the provisions of the Newspapers, Printers, and Reading Rooms Repeal Act, 1869 (h), by which every paper or book intended to be published or dispersed must bear upon it the name and address of the printer; and of the Newspaper Libel and Registration Act, 1881 (i), by which all newspaper proprietors must register their names at Somerset House.

The position of the Press in England, therefore, at the present day is that any person may publish what he pleases (subject to the regulations noted above) without obtaining any previous licence. He may, however, be proceeded against for libel, and in both civil and

418); for goods which infringe the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28); for blasphemous and obscene libels, forged documents, counterfeit coins, explosive substances, documents under the Betting and Lotteries Act, 1934, the Dangerous Drugs Acts, the Firearms Act, 1937, the Foreign Enlistment Act, the Hosiery Act, the Public Order Act, 1936, &c. See *Elias v. Pasmore*, [1934] 2 K. B. 164, which allows in case of lawful arrest search of the premises and seizure of all material relevant to prosecution of any person for any offence. At common law the police can search any arrested person, even if not arrested on warrant, in the case of any serious crime.

(c) (1769), *Almon's Case*, 20 St. Tr. 821; (1770), *Woodfall's Case*, 20 St. Tr. 895; *Miller's Case*, *ib.* 870; (1779), *Dean of St. Asaph's Case*, 21 *ib.* 847—1046; (1789), *Stockdale's Case*, 22 *ib.* 287. Stephen, *Hist. Crim. Law*, ii, 416—435; May, *Const. Hist.*, ii, 1—123.

(d) 6 & 7 Vict. c. 96.

(e) *Ib.* c. 68, s. 14.

(f) The same Act requires all theatres to be licensed either by the Lord Chamberlain or justices; the powers of the latter with regard to the licensing of playhouses have now, however, been transferred to the county borough and county councils: 51 & 52 Vict. c. 41, s. 7. Regulations for theatres still can be made by justices.

(g) 20 & 21 Vict. c. 83.

(h) 32 & 33 Vict. c. 24, re-enacting a similar provision contained in 2 & 3 Vict. c. 12, s. 2.

(i) 44 & 45 Vict. c. 60, s. 9.

criminal cases he will only be liable where a jury of twelve persons have, by their verdict, declared him guilty of libel (*k*).

The chief difficulties now are: (1) risk of damages being awarded for libels contained in publications innocently distributed by vendors; (2) damages being given where none have actually been suffered, at present no proof of damage being needed; (3) costs being awarded in excess of damages; (4) absence of full privilege for reports of all meetings, including those of public companies to which the public is admitted. A measure to meet these disadvantages was submitted in 1939, and on February 3 a promise was given to set up a committee to consider the issue.

Allegations of Governmental pressure to influence the Press were discussed in the Commons on December 7, 1938. It appeared that influence had been used during the war crisis to prevent presentation of the case for Czechoslovakia by cinematograph. It is clear, therefore, that there are serious possibilities of deliberate misleading of the public. The Government also controls broadcasting, and can secure the suppression of information and the circulation of such views as it approves, but so far there is no proof of abuse of this authority.

An issue of importance (*l*) is the power to criticise the action of judges. The rules of contempt of Court so far as they prevent prejudice to litigants are not in question, but the use of summary judicial power to deal with comments on judges, scandalising the Court. It seems impossible to deny that attacks of this sort, not connected with current cases, should form the subject of formal indictment with a trial by jury under a judge not personally under attack. Oversea cases (*m*) show the danger of injustice of treatment and even a possibility of such action should in the interests of justice be avoided. A contempt may, it seems, be pardoned (*n*) so far as remission of the penalty is concerned, but it would be far better to have an ordinary trial and appeal.

#### (4) *The Right of Public Meeting.*

The right of public meeting is not specifically provided for by statute; it means merely that people may meet together when and where they please so long as they do not by so doing commit a trespass or a nuisance, or so long as the meeting does not constitute an unlawful assembly. With regard to trespass, little need be said. It is obvious that, even if there be no other place available for the purpose of public meeting, that fact would not justify the infringement of another's private rights, and all persons who commit a trespass for the purpose of holding a meeting are liable to be mulcted in damages. There are

(*k*) *Broome v. Agar* (1928), 44 T. L. R. 339; *Lockhart v. Harrison* (1928), *ib.* 794 (H. L.). For liability through innocent circulation, see *Bottomley v. Woolworth & Co.* (1932), 48 T. L. R. 521. The privilege of newspapers not to disclose sources of information does not extend to writers of alleged libellous letters: *South Suburban Co-operative Soc., Ltd. v. Orum and Croydon Advertiser*, [1937] 2 K. B. 690.

(*l*) H. J. Laski, *Studies in Law and Politics*, ch. x.; cf. *R. v. Gray*, [1900] 2 Q. B. 36; *R. v. New Statesman*, reported *ib.* xxx, February 18, 1928.

(*m*) *Ambard v. Att.-Gen. for Trinidad and Tobago*, [1936] A. C. 322.

(*n*) *Special Ref. from Bahama Islands, In re*, [1893] A. C. 138.

obvious advantages in allowing meetings as a safety valve, and the Parks Regulation Act, 1872 (35 & 36 Vict. c. 15), amended in 1926 and 1936, and the regulations thereunder permit such meetings in reasonable conditions. Boroughs and county councils have powers to regulate these matters under the Municipal Corporations Act, 1882, and the Local Government Act, 1888, now under the Open Spaces Act, 1906 (6 Edw. VII. c. 25). Similarly, the police in London may, under the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47) s. 52, and the Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134) s. 24, regulate processions. Further powers are given by the Public Order Act, 1936, discussed below.

With regard to nuisance it may be noted that the law does not recognise any specific locality, such as Trafalgar Square, as being a public forum where people may meet and discuss public questions (*o*); it is true that the streets are open to the public, but they are to be used by the public for the purposes of traffic only, and anyone who, by holding a meeting or otherwise, interferes with the right of every individual to use the streets for purposes of traffic, commits a nuisance, which constitutes a misdemeanour for which he may be fined (*p*). But a meeting is not unlawful merely because held on a highway (*q*). A meeting which ceases to be orderly may be ordered to disperse on the ground that it is a public nuisance, and it may then be dispersed by the police under statute. It is also lawful for a police officer to forbid the holding of a meeting in a special street, because it may lead to disorder, and opposition to him becomes illegal obstruction (*r*).

**Unlawful Assembly and Riot.**—Any person taking part in an unlawful assembly is guilty of a misdemeanour for which he may be punished on indictment or criminal information, and an unlawful assembly is one which (1) assembles to commit, or when assembled does commit, a breach of the peace; (2) assembles to commit a crime; (3) assembles for any purpose, lawful or unlawful, but (through the conduct of those engaged in it, such as carrying arms or the like) in such a manner as to cause reasonable persons to fear that a breach of the peace will be committed (*s*). A riot involves a tumultuous disturbance of the peace by three persons or more assembling together of their own authority with mutual intent to assist one another against any opposition in the execution of some private purpose, and afterwards actually executing it in a turbulent manner to the terror of the people, whether the act intended is lawful or not (*t*). All persons may, and

(*o*) *R. v. Graham and Burns* (1888), 16 Cox, 420.

(*p*) *Lewis, Ex parte* (1888), 21 Q. B. D. 191; *Harrison v. Rutland*, [1893] 1 Q. B. 142; *Hickman v. Maisey*, [1900] 1 Q. B. 752. Cf. Highway Act, 1835 (5 & 6 Will. IV. c. 50), s. 72; *Homer v. Cadman* (1886), 16 Cox, 51; *Duncan v. Jones*, [1936] 1 K. B. 218, is based on a different point, see p. 434, *ante*, and *post*; for the foreshore, under a bye-law, see *Brighton Corp'n. v. Packham* (1908), 72 J. P. 318; for Clapham Common, *De Morgan v. Metropolitan Board of Works* (1880), 5 Q. B. D. 155.

(*q*) *Burden v. Rigler*, [1911] 1 K. B. 335.

(*r*) *Duncan v. Jones*, [1936] 1 K. B. 218.

(*s*) *R. v. Neale* (1839), 9 Car. & P. 431; *R. v. Vincent* (1839), 3 St. Tr. (N.S.) 1037; *R. v. Billingham* (1825), 2 C. & P. 234; *R. v. Birt* (1831), 5 C. & P. 154.

(*t*) Riot (Damages) Act, 1886 (49 & 50 Vict. c. 38), provides for local liability in riot damage. See *Field v. Receiver Metr. Pol.*, [1907] 2 K. B. 853; *Ford v. Receiver*

must when called upon to do so, assist in dispersing an unlawful assembly; and when a meeting becomes riotous, any amount of force may be used according to the necessity of the case, and it is not necessary that a proclamation under the Riot Act (*u*) should first be read. The only effect of the reading of the proclamation is that any twelve persons not dispersing within an hour of the reading of the proclamation are guilty of a felony, and, if they are killed or injured, the actors are indemnified. Armed opposition to reading the proclamation is felony.

Magistrates not only may disperse an unlawful assembly, but they are guilty of criminal negligence if they do not make use of every means in their power to do so (*v*). A difficult problem is presented where action not illegal is accompanied on the part of others by breach of the peace. In *Beatty v. Gillbanks* (*w*) the issue was the conviction of the leader of a number of Salvationists on a charge of unlawful assembly, two justices having ordered him and others to abstain from assembling to disturb the peace; the disturbance was the work of persons hostile to the Salvationists, and Beatty claimed the right to disregard the justices' order. On a case being stated, however, by the magistrates, the Court of Queen's Bench held that the conviction was wrong on the ground that a man cannot be convicted for doing a lawful act even though he knows that his doing it may cause another to commit an unlawful act. The case of *Wise v. Dunning* (*x*) must now be read in connection with this, which shows that, if people meet to carry out an otherwise lawful purpose in an unlawful manner, such as holding meetings and using language slanderous of Roman Catholics in Liverpool, being a district largely inhabited by persons of that religion, they are guilty of an unlawful assembly, or at least a magistrate is justified in binding them over to keep the peace, if there is evidence to warrant the apprehension that a breach of the peace may be committed (*y*). *Duncan v. Jones* (*z*)

*Met. Pol.*, [1921] 2 K. B. 344; *Pitchers v. Surrey County Council*, [1923] 2 K. B. 415; *London, &c. Ins. Co. v. Bolands, Ltd.*, [1924] A. C. 836; *Jarvis v. Surrey County Council*, [1925] 1 K. B. 554. For the definition, see Hawkins, *Pleas of the Crown*, c. 65, s. 1; a rout is a disturbance of the peace by persons assembled to do a thing which, if executed, will make them rioters, and actually making a motion thereunto.

(*u*) 1 Geo. I. st. 2, c. 5; *R. v. Child* (1831), 4 C. & P. 442. Mere presence does not make a bystander a felon: *R. v. Atkinson* (1869), 11 Cox, 330.

(*v*) As to the duty of a magistrate in suppressing riot, see *R. v. Pinney* (1832), 5 Car. & P. 254; and as to dispersing unlawful assemblies, see the judgment of Littledale, J., in *R. v. Neale* (1839), 9 Car. & P. 431. For the use of military forces by order of the King, in view of the failure of the magistrates in the Gordon riots, see May, *Const. Hist.*, ii, 24—27; on the Manchester massacre (1819), see May, ii, 78—80; on the proper use of the military, report on Featherstone riots (1894), C. 7234. In *Miller v. Knox* (1839), 4 Bing. N. C. 574, it was ruled that, despite the orders of the Irish executive to the Royal Irish Constabulary not to assist in executing tithe judgments, they must assist in case of necessity.

(*w*) (1882), 9 Q. B. D. 308; and see *R. v. Justices of Londonderry* (1891), 23 L. R. Ir. 440, at p. 461.

(*x*) [1902] 1 K. B. 167.

(*y*) A local Act in force in Liverpool prohibits the use of threatening, abusive, and insulting words or behaviour in the street; but this fact does not appear to have influenced the decision: see the judgment of Darling, J., at p. 177.

(*z*) [1936] 1 K. B. 218.

permits a police officer to forbid a meeting being held at a particular place if the result will be that sympathisers with—not opponents of—the speaker will proceed to riotous action. In an older case (*a*) a constable was held to be justified in taking an orange lily from a lady who was wearing it under such circumstances as to cause tumult and excitement, and to lead to the fear of a breach of the peace being committed. But, as was said by O'Brien, J., in that case, such an extreme case of interference with the private rights of individuals can only be justified by the strongest necessity, and it might easily result in "making not the law of the land but the law of the mob supreme," as Fitzgerald, J., suggested.

A proclamation by a Secretary of State or by a magistrate cannot make an otherwise lawful assembly unlawful; the only effect of such a proclamation can be to make people thoroughly cognisant of what is likely to occur, and therefore to militate against their chance of escaping liability on the ground of non-participation in the event of an unlawful assembly actually taking place and their being charged with the offence (*aa*).

Where, however, a breach of the peace has actually occurred through the attacks of wrongdoers, a meeting perfectly lawful in its inception and in the manner of its carrying out may be called upon by magistrates and constables to disperse. But this is only justifiable by necessity, and the constables ought first to arrest the wrongdoers (*b*). Any other course is a direct encouragement of illegal interference with freedom of assembly.

How far persons who are taking part in a lawful assembly are justified in resisting the efforts of the police or other persons to disperse them seems open to doubt. But, as was pointed out by Wilde, C.J., in *R. v. Ernest Jones* (*c*), it is obvious that in all cases they are not justified in using extreme measures and must only act in self-defence; their duty is evidently to retreat where possible rather than by standing their ground to cause a breach of the peace, and their proper remedy is an action for damages for assault or false imprisonment.

There are certain special statutory rules, not normally put into operation. Meetings of over fifty persons within a mile of Westminster Hall or the Law Courts when Parliament or the Courts sit are unlawful (*d*). The administration or taking of oaths to embark on a seditious or mutinous purpose or join a society formed for such a purpose is illegal (*e*). Illegal drilling or practising military evolutions without authority from the King, or since 1920 a Secretary of State, is punishable (*f*). Tumultuous petitioning is forbidden (*g*), and, if it is expected that any agitator may organise such a petition to Parliament, he may be asked to give security for good behaviour under 34 Edw. III., c. 1; on refusal he may be imprisoned, as was Mr. Tom Mann in 1933. There is also a general prohibition in the Convention

(*a*) *Humphries v. Connor* (1864), 17 Ir. C. L. R. 1.

(*aa*) *R. v. Fursey* (1833), 6 Car. & P. 81.

(*b*) See *O'Kelley v. Harvey* (1882), 14 L. R. Ir. 105.

(*c*) (1848), 6 St. Tr. (N. S.) 783; and see *R. v. Fursey*, cited above.

(*d*) 57 Geo. III. c. 19.

(*e*) 37 Geo. III. c. 123.

(*f*) 60 Geo. III. & 1 Geo. IV. c. 1, s. 1.

(*g*) 13 Car. II. st. 1, c. 5.

(Ireland) Act Repeal Act, 1879 (42 & 43 Vict. c. 28), s. 2, of any assembly taking on itself the functions of either House of Parliament or seeking to bring Parliament into hatred or contempt.

**Public Meeting Act, 1908.**—By the Public Meeting Act, 1908 (*h*), disorderly conduct at any lawful public meeting is punishable by fine or imprisonment, and in the case of a political meeting is an illegal practice within the Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51).

**Public Order Act, 1936** (*i*).—Fascist propaganda in 1936 necessitated drastic legislation to secure peace. The use of uniforms in public places or at public meetings signifying association with any political organisation or the promotion of a political object, is illegal, unless on a special permit by the chief officer of police with the consent of a Secretary of State. Quasi-military organisations organised to usurp the functions of the police or for displaying physical force for political objects are also illegal. A chief officer of police can regulate processions; outside the City of London and the Metropolitan Police area he can apply to the borough or urban district council for an order forbidding meetings for a period up to three months; the consent of the Secretary of State is necessary; in these areas the Commissioner of the City of London Police or the Commissioner of Police of the metropolis can exercise the power of prohibition with like consent. The possession of offensive weapons at public meetings or processions is illegal, and also offensive conduct conducive to breaches of the peace. Further, by sect. 6, the Public Meeting Act is reinforced by the rule that on the request of the chairman a constable can ask an interrupter his name and address, and if he refuses, or there is reasonable suspicion that he is giving a false name and address, he can arrest without warrant.

#### (5) *The Right of Association.*

The right of association is derived from (1) the freedom to contract under common law, (2) the power to form trusts freely, (3) the right to form companies, and (4) the special privileges given to trade unions, taken in conjunction with the laxity of the law of conspiracy. This position is due to legislation from 1871 (*k*).

**The Position of Trade Unions.**—It is normally legal for persons to combine, but it is an actionable conspiracy to combine for an unlawful end, or to combine to do a lawful act by unlawful means. Thus a combination to injure a person in his trade by inducing persons not to deal with him (*l*) is illegal. But wholesale dealers may threaten

(*h*) 8 Edw. VII. c. 66.

(*i*) 1 Edw. VIII. & 1 Geo. VI. c. 6.

(*k*) 34 & 35 Vict. c. 31. From 1349 onwards labour was controlled by a series of statutes reinforced in 1548. These restraints on combination were greatly modified in 1824—25 (5 Geo. IV. c. 95, replaced and modified, 6 Geo. IV. c. 129), but trade unions were first given a limited legal capacity by the Trade Union Act, 1871. For action against societies (Corresponding Societies, Orange Lodges, Chartists), see May, *Const. Hist.*, ii, 62, 90, 110, 114—118.

(*l*) Cf. *Temperton v. Russell*, [1893] 1 Q. B. 715; *Quinn v. Leatham*, [1901] A. C. 495; *Sweeney v. Coote*, [1907] A. C. 221. The doctrine is old: *Lumley v. Gye* (1853), 2 E. & B. 224; *Bowen v. Hall* (1881), 6 Q. B. D. 333.

to withdraw supplies from a tradesman unless he ceases to supply a certain individual, provided their object is to further their own interests, not merely to injure (*m*). Moreover, until 1875, such actions if intended to injure might be criminal conspiracy (*n*). In connection with trade disputes, but also generally, it is made clear (*o*) that it cannot be a crime to combine to do any act which would not be punishable if done by an individual. The Trades Disputes Act, 1906 (6 Edw. VII. c. 47), gave further protection to trade unions, by extending to civil proceedings the principle mentioned (*s*. 1). It also renders innocent the act of inducing breach of contract or interference with business if done in contemplation of a trade dispute (*s*. 2), and frees trade unions from liability for any torts (*p*) committed in their interest (*s*. 4). But the Trade Disputes and Trade Unions Act, 1927, passed as a means of averting the danger of a fresh attempt at a general strike, declares illegal any strike whose object is other than the furtherance of a trade dispute within the trade or industry of the strikers and is designed to coerce the Government directly or by inflicting hardship on the community. It is an offence to take part in an illegal strike, and the Attorney-General may apply for an injunction against the use of the society's funds in support of such a strike, and protection is accorded to any person refusing to take part in an illegal strike. Analogous rules apply to a lock-out of employees. Reference has already been made to the restrictions on civil servants in respect of associations (*q*), and public authorities may not differentiate in employment on the score of membership of trade unions (*r*). Nor should they, during a general strike, take action of a kind tending to assist the strikers to destroy the ministry (*s*).

Protection is accorded by legislation in 1913, improved by the Act of 1927 (*t*), to workers as regards contributions to political purposes. The issue arose from the practice of devoting compulsory levies to one political purpose, thus compelling all members of a union on penalty of expulsion and loss of livelihood to contribute (*u*). It is now clear that no person can be made to pay unless he voluntarily agrees to do so, but illicit pressure still is possible, and in some cases, certain.

(*m*) Cf. *Mogul Steamship Co. v. McGregor*, [1892] A. C. 25; *Sorrell v. Smith*, [1925] A. C. 700; *Hardie and Lane, Ltd. v. Chilton* (No. 2), [1928] 2 K. B. 306; *Thorne v. Motor Trade Association*, [1937] A. C. 797, which overrules *R. v. Denyer*, [1926] 2 K. B. 258.

(*n*) *R. v. Rowlands* (1851), 5 Cox, 466—495; *R. v. Duffield* (1851), *ib.* p. 431; enacted 24 & 25 Vict. c. 100, s. 41; cf. the Criminal Law Amendment Act, 1871 (34 & 35 Vict. c. 32), s. 1; *R. v. Bunn* (1872), 12 Cox, 316.

(*o*) Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86). It repeals the Act of 1871, and leaves only a few breaches of contract criminal (ss. 4—7).

(*p*) This destroys the effect of the decision in the *Taff Vale Case*, [1901] A. C. 426. See *Vacher v. London Society*, [1913] A. C. 107. It is general in ambit: *Hardie and Lane v. Chilton*, [1928] 1 K. B. 663. Peaceful picketing was facilitated by the Act, as against the restrictive decisions on the Act of 1875 in *Lyons v. Wilkins*, [1899] 1 Ch. 255; *Charnock v. Court*, [1899] 2 Ch. 35. The Act seems to allow continuous use of the highway by pickets: *Ferguson v. O'Gorman*, [1937] Ir. R. 620.

(*q*) See p. 197, *ante*.

(*r*) *Att.-Gen v. Birkenhead Corp.* (1929), 93 J. P. 33.

(*s*) *Scammell and Nephew, Ltd. v. Hurley*, [1929] 1 K. B. 419.

(*t*) 2 & 3 Geo. V. c. 30; 17 & 18 Geo. V. c. 22, s. 4.

(*u*) *Amalgamated Society v. Osborne*, [1910] A. C. 87.

Trade unions, while thus subject to disabilities, have certain privileges. Though not registrable as companies, they have a definite legal personality and their funds are protected from dishonesty of servants. On the other hand, no proceedings can be brought directly to enforce any agreement entered into for the purpose of carrying out any objects of the union or any bond to secure such agreement (x). But the Courts may restrain illegal use of funds and the expulsion of members who refuse to subscribe to such illegal use (y), and may pronounce on the validity of any rule of the union (z). But trade union tribunals have the same status as domestic tribunals (e.g., of clubs), and a member cannot complain if he is treated with due regard to the principles of natural justice (a).

(x) *Russell v. Amalgamated Society*, [1912] A. C. 421; *Baker v. Ingall*, [1911] 2 K. B. 132; *Miller v. Amalgamated Engineering Union*, [1938] Ch. 669.

(y) *Amalgamated Society v. Osborne*, *ubi sup.* Cf. *Ross v. Electrical Trades Union* (1937), 81 S. J. 650; *Electrical Trades Union v. Nippres* (1937), 81 S. J. 629; Cf. also *Draper v. British Optical Assocn.* (1937), 54 T. L. R. 245.

(z) *Gozney v. Bristol, &c. Soc.*, [1909] 1 K. B. 901. *Cox v. National Union* (1928), 44 T. L. R. 345, shows that an injunction will not lie where direct action is impossible. On union powers, see *National Union of Seamen, In re*, [1929] 1 Ch. 216. Cf. *Burn v. National Amalgamated Labourers' Union*, [1920] 2 Ch. 364; *O'Neill v. Transport and General Workers' Union*, [1934] Ir. R. 633.

(a) *Maclean v. Workers' Union*, [1929] 1 Ch. 602.

## CHAPTER III.

## OFFENCES AGAINST THE STATE.

**Treason.**—Treason was an offence against allegiance, high treason against allegiance to the King, and, as allegiance is personal, it is one of the crimes that is punished though committed out of England on apprehension therein (*a*). By the Treason Act, 1695, in the case of acts of treason or misprison of treason, other than a design or attempt to assassinate the King, committed in England or Wales, an indictment must be found by a grand jury within three years after the commission of the offence (*b*). But this provisions does not, it seems, extend to treason committed outside the realm, or in Scotland, or Ireland.

The offences constituting treason were first statutorily defined by the Treason Act, 1352 (25 Edw. III., st. 5, c. 2), which still remains the basis of the law of treason. By this Act, as extended by subsequent Acts (*c*), the following offences now constitute treason:—

- (1) Compassing or imagining the death of the reigning King or Queen, or of the King's wife during the King's life, or of the King's eldest son and heir; also, it is said by Lord Coke, of the heir apparent, unless he be a collateral.

This was subsequently extended by the Treason Act, 1795, to compassing or devising, &c., any bodily harm tending to death or destruction, maiming or wounding, imprisonment or restraint of the person of the King, his heirs and successors (*d*). The Act formed part of Mr. Pitt's policy of refusing public liberties, and was part of the governmental reply to the acquittal of Messrs. Hardy and Horne Tooke.

- (2) Levying war against the King in his realm; extended to cases of riot of *Dammaree's Case* (1710); but there must be, it seems, an insurrection accompanied by force, and for an object of a public or general nature (*e*).

(*a*) *R. v. Lynch*, [1903] 1 K. B. 444; *R. v. Casement*, [1917] 1 K. B. 98, 133.

(*b*) Treason Act, 1695 (7 & 8 Will. III. c. 3), ss. 5, 6.

(*c*) The principal of these are the Treason Act, 1795 (36 Geo. III. c. 7); and the 57 Geo. III. c. 6, repealed, but re-enacted in parts, by the Treason Felony Act, 1848 (11 & 12 Vict. c. 12).

(*d*) 36 Geo. III. c. 7, s. 1. A conspiracy to depose the King in an overt act of compassing and is treason: *Horne Tooke's Case* (1794), 25 St. Tr. 1, 725; *R. v. Hardy* (1794), 24 St. Tr. 199, 1379; so a conspiracy to levy war: *R. v. Gregg* (1708), 14 St. Tr. 1371; *R. v. Hensey* (1758), 19 St. Tr. 1341; naturalisation in a foreign country with a view to treason: *R. v. Lynch*, [1903] 1 K. B. 444, 459.

(*e*) *Dammaree's Case* (1710), 15 St. Tr. 521; *R. v. Frost* (1839), 9 C. & P. 129; 3 Co. Inst. 9, 10; *R. v. Messenger* (1668), 6 St. Tr. 879; *R. v. Gordon* (1781), 21 St. Tr. 485.

- (3) To adhere to the King's enemies, giving them aid and comfort in the realm (*f*) or elsewhere (*g*). This includes sending intelligence to the enemy, even if intercepted (*h*).

It is no excuse for treason that it is committed from fear of loss of property, but it is an excuse that there is fear of death and that the accused abandoned the rebels as soon as he could (*i*). The orders of a superior officer are of no value to excuse treason (*k*).

- (4) To violate the King's wife during his life, or the wife of his eldest son during coverture, or the King's eldest daughter, being unmarried.
- (5) By the Treason Act, 1702, and the Succession to the Crown Act, 1707 (*l*), it is treason to endeavour to deprive or hinder the person next in succession under the Acts regulating the succession to the Crown, from succeeding to the Crown; or maliciously and advisedly to affirm in writing or printing that any other person has any right to the Crown otherwise than according to the Bill of Rights, 1689, the Act of Settlement, 1701, and the Union with Scotland Act, 1707.

Three other offences were also declared to be treason by the Act of Edward III., but these may now be treated as felony or murder simply (*m*). These were: (1) To counterfeit the Great Seal, Privy Seal, or coin of the realm; (2) to issue false money—these have ceased to be treasons under the Coinage Offences Act, 1832 (2 & 3 Will. IV. c. 32), and the Forgery Act, 1830 (11 Geo. IV. and 1 Will. IV. c. 66); (3) to kill the Chancellor, Treasurer, or any of the King's justices in the execution of their office.

The penalty of drawing and quartering, together with forfeiture (except on outlawry), having been abolished by the Forfeiture Act, 1870, the punishment for treason is hanging as provided for women in 1790 and for men in 1814; but the Sovereign may direct decapitation in place of hanging, by order under the sign manual countersigned by a Secretary of State (*n*). There are no accessories in treason before or after the fact, all such persons being principals (*o*). The oath of two witnesses, either to the same overt act or one to one and the other

(*f*) *R. v. Ahlers*, [1915] 1 K. B. 616. Traitorous intention is essential.

(*g*) The words "or elsewhere" apply to adhering: *R. v. Lynch, ubi sup.*; *R. v. Casement, ubi sup.* Cf. *R. v. Vaughan* (1696), 13 St. Tr. 525.

(*h*) *R. v. Hensey, ubi sup.*; *R. v. McLane* (1797), 26 St. Tr. 721, 796.

(*i*) *R. v. MacGrowther* (1746), 18 St. Tr. 391, 394; *R. v. Oldcastle* (1419), 1 Hale, P. C. 50.

(*k*) *Axtell's Case* (1660), 5 St. Tr. 1146, 1175; *Gordon's Case* (1746), 1 East, P. C. 71.

(*l*) 1 Anne, st. 2, c. 21; 6 Anne, c. 41.

(*m*) 24 & 25 Vict. c. 100; 3 & 4 Geo. V. c. 26; 26 Geo. V. & 1 Edw. VIII. c. 16.

(*n*) See the Treason Acts, 1790 and 1814 (30 Geo. III. c. 48, s. 1; 54 Geo. III. c. 146, s. 1); the Forfeiture Act, 1870 (33 & 34 Vict. c. 23, s. 31); and as to decapitation, the Treason Act, 1814, s. 2. The property of any person outlawed for not appearing to meet a charge of treason is subject to forfeiture: Forfeiture Act, 1870, s. 1, but outlawry is abolished by the Administration of Justice (Miscellaneous Provisions) Act, 1938 (1 & 2 Geo. VI. c. 63), s. 12.

(*o*) 3 Co. Inst. 138. Under 7 & 8 Will. III. c. 3, the accused can challenge thirty-five jurors, and by 7 Anne, c. 21, lists of jurors and witnesses must be provided ten days before trial.

to another overt act of the same treason, is required before proceedings can be commenced.

**Treason Felony.**—By the Treason Felony Act, 1848, the following offences constitute treason felony (*p*):—

- (1) Compassing or devising, &c. to depose the Sovereign, his heirs and successors, *e.g.*, a conspiracy to detach Ireland from the United Kingdom (*q*), or to levy war for that end (*r*), or the storing of arms or the possession of explosives for such an end (*s*).
- (2) Levying war against the Sovereign in the United Kingdom or without, in order to make him change his counsels, or to intimidate or overawe either House of Parliament (*t*).
- (3) Inciting foreigners to invade the realm or any of the King's dominions.

Misprison of treason is the bare concealment (*u*) or keeping secret of any high treason (*x*), and in order to constitute the offence there must be a knowledge both of the persons as well as of the treason itself. To avoid the guilt of misprison of treason, disclosure of the treason must be made to some magistrate or person in authority (*y*). Conviction, for which the oath of two witnesses is required, entails imprisonment for life.

The offences which constituted petty treason under the Treason Act, 1352, are now, by the Offences against the Person Act, 1861, to be treated as murder simply.

**Official Secrets.**—Legislation penalises persons who approach prohibited places, or sketch such places, or take copies of prohibited documents, or communicate sketches or copies, or receive them. Such acts are felonies. It is a misdemeanour carelessly to part with sketches or information to unauthorised persons, or retain them unduly long. It is a misdemeanour to harbour spies (*z*). It is also illegal to wear unauthorised uniforms in order to obtain admission to prohibited places; or to make false declarations for that end; to forge passports or permits; to pretend to be a governmental officer or in the employment of an officer; to communicate with foreign agents with a view to prejudice the State; or to interfere with the police or military with such a purpose. The Act provides for inter-

(*p*) 11 & 12 Vict. c. 12. The penalty is penal servitude for life, or any period not less than three years, or imprisonment with or without hard labour for a term not exceeding two years: *ib.* s. 3; 54 & 55 Vict. c. 69, s. 1. The indictment is not bad if the acts alleged amount to treason, but no one tried for treason felony can later be tried for treason on the same facts.

(*q*) *R. v. Gallagher* (1883), 15 Cox, 291, 317. See also *R. v. Deasy*, *ib.* 334.

(*r*) *Mulcahy v. R.* (1868), L. R. 3 H. L. 306.

(*s*) *R. v. Davitt* (1870), 11 Cox, 676.

(*t*) *R. v. Meaney* (1867), Ir. R. 1 C. L. 500. This case shows that there are no accessories before the fact; all are principals.

(*u*) *R. v. Thistlewood* (1820), 33 St. Tr. 681.

(*x*) 1 & 2 Phil. & Mar. c. 10, s. 8.

(*y*) See 1 East, P. C. 139, 140.

(*z*) Official Secrets Act, 1911 (1 & 2 Geo. V. c. 28).

ception of telegrams and control of receivers of letters, and for securing information as to spies (a).

Serious anxiety regarding the freedom of the Press was occasioned in 1938 (b) by realisation of the fact that power existed to fine a journalist for refusing to reveal the source of some information as to a wanted man which he had presumably derived from an official source. It was insisted by organisations representing journalists that this involved a breach of the understanding that the Acts were to strike at espionage and the Home Secretary gave a more or less clear assurance that there would be a more restricted use of the Acts. But amendment was still pressed for, and the danger of misuse of the power taken is patent. It was, therefore, agreed to amend sect. 6 of the Act of 1920.

**Other Offences.**—Riot, rout, unlawful assembly, and sedition have already been mentioned (c). Penal servitude for life is possible as a punishment for incitement of His Majesty's soldiers or sailors to mutiny (d). A more summary procedure applies under the Incitement to Disaffection Act, 1934 (e). Contrary to the normal rule verbal slander of members of the two Houses or of either Chamber or a High Court judge is a misdemeanour.

A very serious danger from the use of explosives for the wanton destruction of life and property in support of a movement to establish a republic in Ireland was renewed in January, 1939, and led to proceedings under the Explosive Substances Act, 1883.

(a) Official Secrets Act, 1920 (10 & 11 Geo. V. c. 75).

(b) *Lewis v. Cattle*, [1938] 2 K. B. 454. See also the case of Mr. Sandys and Parliamentary privilege, p. 70, *ante*.

(c) See pp. 451, 452, 453, *ante*.

(d) 37 Geo. III. c. 70, s. 1. It is similarly an offence under the Police Act, 1919 (9 & 10 Geo. V. c. 46), to cause disaffection among members of the force.

(e) A student was sentenced in March, 1937, to twelve months' imprisonment for seeking to incite an airman to disloyal action; *R. v. Phillips*, *The Times*, March 10 and 15, 1937; he was released after six months' detention in time to resume his studies. The view that this was an excessive sentence was widely held. There is alleged to exist a tendency in police circles to press the law against "left wing" activities; W. H. Thompson, *Civil Liberties* (1938); "Solicitor," *English Justice* (1932), p. ix; C. Muir, *Justice in a Depressed Area* (1936), p. 27; H. J. Laski, *Parl. Govt.*, p. 384, disapproves the sentences—later reduced—in the Haworth cases, but the rioting there seems to have been very dangerous and to have called for repression before matters ceased to be capable of reduction to normal. For the Parliament Square and Piccadilly Circus incidents, Jan. 31, 1939, see H. C. Deb., Feb. 13, 1939; Sir S. Cripps, *The Times*, May 11 and 22.

## PART IX.

### The British Empire.

#### CHAPTER I.

#### THE UNITED KINGDOM, THE CHANNEL ISLANDS, AND THE ISLE OF MAN.

##### *The United Kingdom and the Empire.*

ENGLAND forms with Scotland and Northern Ireland the United Kingdom of Great Britain and Northern Ireland, a style adopted after the Imperial Conference of 1926 to mark the change brought about by the grant of Dominion status to the Irish Free State (*a*). With the Channel Islands and the Isle of Man the United Kingdom makes up the British Islands, though in certain cases the term still includes the Irish Free State, renamed in 1938, by the Eire (Confirmation of Agreements) Act, Eire (*b*).

With the Dominions the United Kingdom constitutes the British Commonwealth of Nations according to the recent popular use of that term, which sometimes, however, includes India, and sometimes, and in legal documents regularly, is synonymous with the British Empire (*c*). That term covers the whole of the dominions of the Crown, and also often includes the Protectorates, Protected States, and Mandated Territories. India, itself an Empire, is an essential part of the Empire.

Of these territories it must suffice to give a brief account with special reference to their relations to the Government and Parliament of the United Kingdom, which are Imperial, both in the historical sense of owning no superior power as declared by Henry VIII., and in the modern acceptance of possessing sovereign power over dependent territories.

##### *The General Scheme of Local Government in England and Wales.*

Prior to the creation of the county councils by the Local Government Act of 1888, much of the administration of the county was in the hands of the justices of the peace, either in or out of sessions, while the affairs

(*a*) 17 & 18 Geo. V. c. 4; Proclamation, May 13, 1927 (S. R. & O., 1927, p. 325).

(*b*) Order in Council, March 27, 1923 (S. R. & O., 1923, No. 405, p. 400); 1 & 2 Geo. VI. c. 25, s. 1.

(*c*) Keith, *Constitutional Law of the British Dominions*, pp. 89, 90.

of the parish (*d*) rested in the hands of the vestry, headed by the parson and churchwardens. At the present day the administration of matters relating to police, licensing, reformatories, asylums, industrial schools, education, highways and open spaces, allotments, cemeteries, and in particular the administration of the Public Health Acts and of the poor laws, or public assistance, has been handed over to the county councils and various other bodies under the general supervision of the Ministry of Health. In towns having a municipal corporation the borough councils have always had wide powers.

This scheme of local government was perfected by the Local Government Act of 1894, which created the present parish meetings and parish councils, to take the place of vestries in rural districts, and the rural and urban district councils.

In urban districts, parish meetings and parish councils were not created by the Act of 1894, and the old vestries were left to exercise such of their former powers as might not be transferred to the urban district councils or borough councils, either by the Act of 1894 or by order of the Ministry of Health.

**The London Area.**—The City of London stands apart, being administered under its old charters in part and usages. The Lord Mayor, twenty-six aldermen, and 200 common councillors (elected by the liverymen of the city companies) form the Court of Common Council, but the Court of Aldermen has certain powers. The city has its own police, and in general the city has the authority of a county borough, but not in matters of education, which the London County Council controls, and in 1929 public assistance was handed over to that body. It is the sanitary authority for the Port of London. In the metropolis the London County Council, now consisting of 120 councillors elected for three years, and twenty aldermen for six years, created under the Local Government Act of 1888, took the place of the former Metropolitan Board of Works, whilst beneath this body were the various vestries and district boards (*e*), whose constitution, powers, and duties as to sewers, paving, lighting, highways, street watering, cleansing, &c., were regulated by the Metropolis Management Acts, 1855 to 1890, and by the Local Government Act, 1894, and who also administered the Public Health Act, 1891 (*f*).

Under the London Government Act, 1899, the administrative county of London has now been divided into twenty-eight boroughs, one of which by royal charter of October 19, 1900, became the City of

(*d*) The oldest unit was the vill, or township, to which importance attached for police purposes; under Edward I. we find the ecclesiastical parish, fully organised, which during the reign of Henry VIII. was used for civil purposes, the churchwardens being entrusted with the relief of the poor. On December 1, 1931, there were about 15,000 local authorities:—county councils, 62; boroughs: county, 83; others, 258; metropolitan, 29; district councils: urban, 778; rural, 635; parish councils, 7,100; meetings, 5,600. For the chief authorities, see Local Government Act, 1933, Sched. I.

(*e*) Certain Metropolitan vestries were united into groups to form fifteen district boards, whose constitution was regulated by the Metropolis Management Act, 1855. For election rules, see S. R. & O., 1898, No. 244.

(*f*) 54 & 55 Vict. c. 76, s. 99.

Westminster, and the town councils constituted for these boroughs by Order in Council under the Act (*g*) have taken over the powers and duties of the old vestries and district boards, together with some of the duties of the county council, which, however, retains control of education, public assistance, and housing in general. The police for London and the surrounding area is controlled by the Home Secretary; the water supply is under the Metropolitan Water Board, created in 1902; the Thames under the Port of London Authority, which manages the docks and wharves, and above Teddington under the Thames Conservancy; there is a London and Home Counties Joint Electricity Authority; and the London Passenger Transport Act, 1933, places the whole area under a single expert authority as regards underground, bus and tramway traffic.

Local government in Scotland and Northern Ireland does not come under the scheme provided for England and Wales, but is regulated by special Acts relating to those two countries respectively. In the case of Northern Ireland the control rests now with the local Parliament.

The Ministry of Health has now taken the place of the Local Government Board (*h*), but electoral matters were transferred in 1921 to the Home Office.

**The Parish Meeting.**—A parish means a place “for which a separate poor rate is, or can be, made, or for which a separate overseer is, or can be, appointed” (*i*), a definition now only of historical interest. The constitution and powers of the parish meeting are regulated by the Local Government Act of 1894 (*k*). Briefly they are as follows:—

All parochial electors, that is, all persons who are local government electors (*l*), are entitled to attend the parish meeting, which must be held in every rural parish once a year (*m*), and, if there is no parish council, twice a year (*n*).

If there is a parish council, the principal duty of the parish meeting is to elect the parish councillors (*o*), but in any case the parish meeting has the exclusive power of putting in force the Adoptive Acts, viz., the Lighting and Watching Act, 1833, the Burial Acts, 1852 to 1906,

(*g*) Orders in Council, May 15, 1900, Nos. 380—407 (S. R. & O., 1900, p. 987), under 62 & 63 Vict. c. 14. See P. Harris, *London and its Government*.

(*h*) See *ante*, p. 188.

(*i*) Interpretation Act, 1889 (52 & 53 Vict. c. 63, s. 5).

(*k*) 56 & 57 Vict. c. 73, amended by Local Government Act, 1933 (23 & 24 Geo. V. c. 51).

(*l*) The franchise is regulated (Local Government Act, 1933, s. 53) by 18 & 19 Geo. V. c. 12, s. 2, equalising men and women, and amending 7 & 8 Geo. V. c. 64, ss. 3, 4; it rests on occupation as owner or tenant and residence for the qualifying period in the area in question or in the administrative county or county borough in which the area or part thereof is situate, a wife or husband being given the vote if the other has it and is resident with the spouse. The period for registration is three months before June 1. Age twenty-one and British nationality are necessary. Tenants include occupiers of unfurnished lodgings and service occupiers of dwelling-houses.

(*m*) 56 & 57 Vict. c. 73, s. 1. The meeting is held in March. See Local Government Act, 1933, s. 49 (8); Sched. 3, Pt. VI.

(*n*) 56 & 57 Vict. c. 73, s. 19; Local Government Act, 1933, Sched. 3, Pt. VI., s. 1 (2).

(*o*) *Ib.* s. 48.

the Public Improvements Act, 1860, and the Public Libraries Acts, 1892 to 1919 (*p*).

Where there is no parish council the county council may confer any of the powers of that body upon the parish meeting, upon the application of the latter (*q*). The parish meeting also exercises the former powers of the vestry, except with regard to Church matters (*r*), and attends to public paths and rights of way. The parish property vests in a body representing the parish, as also the parish property formerly held by the guardians (*s*). The meeting may authorise a rate up to 8d. in the pound, if there is no council, to include sums under the Adoptive Acts; the Minister of Health may sanction a higher figure for any parish.

**The Parish Council.**—This body is the creation of the Local Government Act of 1894 (*t*). Every rural parish with a population of three hundred and upwards must have a parish council, and, if the population amounts to two hundred or upwards, it is entitled to one if the parish meeting so resolves. Parishes in which the population is less than two hundred may have a parish council, with the consent of the parish meeting, on application to the county council (*u*), and with their consent parishes may be grouped into one council by the county council, which may also dissolve unions.

The number of parish councillors is fixed by the county council, but must not be less than five, or more than fifteen. They are elected at the annual parish meeting, and may be of either sex (*x*); they are elected for three years (*y*) and retire simultaneously; their qualification is regulated by the Local Government Acts of 1894, 1897, and 1917; in addition to parochial electors, residents in or within three miles of the parish for a year preceding are eligible, and also owners of property by any tenure in the parish. The parish council must hold each year four meetings (*z*), and is presided over by a chairman. Its chief powers and duties are: (1) To exercise the powers and duties of the vestry and churchwardens, except in affairs relating to the Church and charities (*a*). (2) To appoint annually a chairman (*b*). (3) To hire land for allotments (*c*). (4) To appoint trustees of non-ecclesiastical parochial charities (*d*). (5) To deal with certain sanitary matters with regard to ponds, ditches, drains, &c. (*e*). (6) To acquire rights of way, recreation grounds and public walks and to supervise

(*p*) 56 & 57 Vict. c. 73, s. 7. Cf. Local Government Act, 1933, s. 305.

(*q*) *Ib.* s. 19; Local Government Act, 1933, s. 273.

(*r*) *Ib.*

(*s*) 19 & 20 Geo. V. c. 17, s. 115.

(*t*) 56 & 57 Vict. c. 73.

(*u*) *Ib.* s. 1 (1), as amended by Local Government Act, 1933, s. 43.

(*x*) *Ib.* ss. 3, 48; Local Government Act, 1933, ss. 50, 57. Nomination and a poll may be substituted if desired by the county council (s. 51), and the parish may be divided into wards.

(*y*) 62 & 63 Vict. c. 10, s. 1; Local Government Act, 1933, s. 50 (2); April 15, 1940, is the next date.

(*z*) 56 & 57 Vict. c. 73, s. 3 (7); Local Government Act, 1933, Sched. 3, Pt. IV. s. 1 (1). The annual meeting falls within fourteen days from April 15.

(*a*) 56 & 57 Vict. c. 73, s. 6.

(*b*) *Ib.* s. 5; Local Government Act, 1933, s. 49 (1).

(*c*) *Ib.* s. 10.

(*d*) *Ib.* s. 14.

(*e*) *Ib.* s. 8.

and control them (*f*). (7) To exercise any powers delegated to it by the district council (*g*). It may complain to the district or county council of insanitary buildings, defective sewers, failure to supply workers' dwellings, and insufficient water supply. It can authorise a rate up to 4*d.*, but needs the approval of the meeting for one up to 8*d.* in the pound. The average rate is not over 1*d.* Higher rates may be permitted for any parish by the Minister of Health. With his assent and that of the county council the parish council may raise loans.

**Parochial Church Councils.**—By the Parochial Church Councils (Powers) Measure, 1921 (11 & 12 Geo. V. No. 1), there were transferred to the church council of every parish all powers, duties, and liabilities of the vestry of such parish relating to the affairs of the church, except as regards the election of churchwardens and the administration of ecclesiastical charities; also the powers, duties, and liabilities of churchwardens with regard to church affairs except as therein mentioned. It thus deals with finance, making a voluntary rate; care and maintenance of fabric and goods of the church and churchyard; acquisition of property; allocation of offertories; appointment and removal of parish clerk and sexton, in agreement in these last two cases with the incumbent, who aids also in electing sidesmen. The council and vestry elect the churchwardens. The electors are all church members over eighteen years, as provided in the Representation of the Laity Measure, 1929 (*h*).

**The Former System of Vestries.**—In rural districts the parish meetings and parish councils created by the Local Government Act of 1894 took over the duties of the vestry with regard to parish property and parochial charities, adopting the permissive Acts (*e.g.*, the Public Libraries Act), &c., but in urban districts the vestry still retained its old powers, or such of them as were not handed over to the town council or urban district council by order of the Local Government Board, or by the Local Government Act, 1894 (*i*). But the creation of parochial church councils by the Measure of the National Assembly of the Church of England (1921, No. 1) deprived them of all ecclesiastical functions, and their other functions have since 1934 passed over to the councils of the urban districts and boroughs.

Vestries were either *Common Vestries* or *Select Vestries*. The common vestry was merely a meeting of all the ratepayers, male and female, in vestry assembled with equal voting power (*k*). Voting

(*f*) *Ib.* ss. 8, 9. With county council sanction compulsory acquisition of land is allowed: see Local Government Act, 1933, ss. 167—170.

(*g*) *Ib.* s. 15; Local Government Act, 1933, s. 88.

(*h*) 19 & 20 Geo. V. No. 2, Sched. s. 3. Residence or six months' regular attendance is necessary. For the right of the Council to make representations regarding the filling of a vacant benefice under the Benefices (Exercise of Rights of Presentation) Measure, 1931 (21 & 22 Geo. V. No. 3), see *King v. Truro (Bishop)*, [1937] P. 36.

(*i*) See 56 & 57 Vict. c. 73, s. 33; 15 & 16 Geo. V. c. 90, ss. 1 (2), 62 (1); Local Government Act, 1933, s. 269, transfers all save church affairs and charities.

(*k*) See *per* Lord Kenyon in *Berry v. Banner* (1793), Peake, p. 217.

power from 1818 under Mr. Bourne's Act, depended on rated value, up to six votes (*l*).

In some parishes the right of all the ratepayers to attend the vestry was restrained by immemorial custom to a select number, termed a *select vestry* (*m*).

Select vestries elected by ballot, were also created by Sir John Hobhouse's Act, 1831 (*n*), which was permissive, and could be adopted on a majority vote of the ratepayers by parishes in any city or town or with more than 800 ratepayers. Voting was equal, each ratepayer having a vote, but the measure was only adopted in a relatively small number of parishes. Their disappearance in London has been noted above.

**The Rural and Urban District Councils.**—England and Wales were first divided into rural and urban districts by the Public Health Act, 1872 (*o*). By that Act urban districts were defined as either (1) boroughs, (2) existing Improvement Act districts, or (3) local government districts; rural districts were poor law unions, or such parts of them as were not included in urban districts. The sanitary authorities placed over these divisions to administer the Act were:—

- (1) Urban { Borough councils.  
Improvement commissioners.  
Local boards of health.

- (2) The boards of guardians for the rural districts.

The Public Health Act, 1875 (38 & 39 Vict. c. 55), gave the Local Government Board certain powers over these rural and urban sanitary authorities, and consolidated the law. The Local Government Act, 1894, authorised the county councils to reconstitute areas, and created the present rural and urban district councils in place of the old sanitary authorities of the Acts of 1872 and 1875, and the constitution and functions of these bodies are now briefly as follows. The Act of 1894 provided that the old urban sanitary authorities were thenceforward to be known as urban district councils (borough councils excepted, which were to retain their name). At the same time this Act, the Local Government Act, 1929 (19 & 20 Geo. V. c. 17), which abolished the guardians who administered the poor law, giving the power to county boroughs and councils, and the consolidating Act of 1933 (23 & 24 Geo. V. c. 51) have altered the constitutions of the old bodies in the following manner:—

- (1) There are no nominated or *ex-officio* members (*p*). (2) The voting powers of the electors does not depend upon the amount of their property, as previously, but each elector has one vote for each

(*l*) 58 Geo. III. c. 69; 59 Geo. III. c. 85; 7 Will. IV. & 1 Vict. c. 45; 13 & 14 Vict. c. 57; one vote for £50; extra votes for each £25 extra.

(*m*) *Per* Lord Kenyon in *Berry v. Banner* (1793), Peake, p. 217.

(*n*) 1 & 2 Will. IV. c. 60.

(*o*) 35 & 36 Vict. c. 79. Urban areas had been created for health purposes by Acts of 1848, 1858, 1862 and 1863. The other districts were for disease prevention and nuisance removal under the boards of guardians by Acts of 1855 and 1860, for sewers under the parish.

(*p*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 23 (1); Local Government Act, 1933 s. 35 (2).

of the number to be chosen (*g*). Under the Act of 1894 the district council consists of a chairman and councillors, who are elected for three years, one-third of their number retiring by rotation in every year or all retiring together; in urban districts there may be subdivisions into wards. The rural district councillors acted under the Act of 1894 as guardians of the poor, and no separate guardians as such were elected for the parish or area (*r*); under the Act of 1929 some councillors serve on the local (guardians) sub-committee of the County Committees. The persons eligible to be district councillors are local government electors, owners of property (*s*), or residents for twelve months in the district, and may be of either sex (*t*). The chairman is elected annually in April, and need not be a member of the council. Disqualifications for membership include employment by the council (*u*), being a contractor for the council, receipt within the preceding twelve months of relief for destitution, conviction of crime within five years preceding, and alienage (*x*). The councils may act by committees with co-opted members, and joint committees may be formed by district councils for matters of common interest.

Generally speaking, the powers conferred by the Act of 1894 and various other Acts, and now exercised by the rural and urban district councils, and the corresponding borough councils in towns which have a municipal corporation, relate to the following matters: air raid precautions under the Air Raid Precautions Act, 1937 (1 & 2 Geo. VI. c. 6); the administration of the Public Health Acts; protection of health in factories and workshops; housing of the working classes; appointment of medical officers of health and inspectors of nuisances; promotion of physical training and recreation under the Physical Training and Recreation Act, 1937 (1 Edw. VIII. and 1 Geo. VI. c. 46); control of minor roads, and, by delegation from the county council, of main roads; but some 4,500 miles of these have now been taken charge of by the Ministry of Transport under the Trunk Roads Act, 1936 (1 Edw. VIII. & 1 Geo. VI. c. 5); pollution of rivers; acquisition of allotments; arrangements for electricity supply with the Electricity Commissioners under the Electricity (Supply) Acts, 1919, 1922, and 1926; the protection of rights of way

(*g*) *Ib.* s. 23 (4); Local Government Act, 1933, s. 39.

(*r*) *Ib.* s. 24 (3). In urban districts the poor laws were still administered by the boards of guardians, a body entirely distinct from the urban district council or borough council, and consisting, since the Act of 1894, entirely of elected members: *ib.* s. 20.

(*s*) 7 & 8 Geo. V. c. 64, s. 10; Local Government Act, 1933, s. 57.

(*t*) Local Government Act, 1933, s. 57.

(*u*) See *R. v. Davies*; *Penn. Ex parte* (1932), 48 T. L. R. 666; cf. as to contractors, *Lapish v. Braithwaite*, [1926] A. C. 275; 45 & 46 Vict. c. 50, s. 12, is repealed, and interest in a contract only forbids voting: Local Government Act, 1933, s. 76. If a councillor votes on an application to build on a development area site, *certiorari* lies to quash the grant of permission: *R. v. Hendon Rural Council*; *Chorley, Ex parte*, [1933] 2 K. B. 696.

(*x*) 56 & 57 Vict. c. 73, s. 46 (1); 19 & 20 Geo. V. c. 17, s. 10 (3); Local Government Act, 1933, s. 59. Bankruptcy in certain cases disqualifies for five years, and conviction for corrupt and illegal practices has certain effects. Surcharge to an amount over £500 by a district auditor disqualifies for five years; cf. Local Government Act, 1933, ss. 229 (2), 230 (2). A member of a local authority may not be appointed when in office or within a year to a paid office under it, save chairman, mayor or sheriff (*s.* 122).

and roadside wastes; the preservation and management of commons; together with some of the duties formerly exercised by the justices out of session, such as the licensing of gangmasters and dealers in game, passage brokers and emigrant runners; the abolition or alteration of dates of fairs; and the execution of the Acts relating to petroleum and infant life protection (*y*). By the Rating and Valuation Act, 1925 (*z*), which abolished the overseers, the rating authorities are county boroughs, urban and rural district councils; in the last case two persons chosen by the parish council or meeting serve on the assessment committee. Rates are levied normally on occupiers; agricultural land and buildings are exempt, industrial and transport hereditaments pay rates on one quarter only of their value; diplomatic persons, the Crown, places of religious worship, buildings used by scientific societies are exempt.

Urban district councils with population exceeding 20,000 in 1901 can act as authorities for elementary education, a power possessed by boroughs with population over 10,000; county and county borough councils have power in respect of all forms of education (*a*).

The councils have for sanitary matters the power to make by-laws binding on all persons, and regulations affecting only a limited class of persons, such as owners of land abutting on a road (*b*). By-laws need the sanction of the Minister of Health, who also regulates all matters affecting medical officers of health and sanitary inspectors of boroughs and districts; the counties pay half the cost of these officers for the districts. Districts must also appoint a clerk, a treasurer, and a surveyor (optionally in case of rural councils). Local authorities can raise loans with central sanction under the Local Government Act, 1933, Part IX.

**The Borough Councils.**—In towns which have a corporation the borough council takes the place of the district council and there are no parish councils. From the reign of Henry I. royal charters were granted to various towns giving them power to elect their own officers, and to hear their own pleas to the exclusion of the Sheriff's Court. The constitutions of all corporate boroughs were remodelled by the Municipal Corporations Act, 1835 (5 & 6 Will. IV. c. 76), and the various Acts relating to municipal corporations were consolidated in the Municipal Corporations Act, 1882 (*c*), by which their constitution and functions are now governed, and which added thirty-eight to the 178 boroughs of 1832.

Under this Act a municipal corporation was created by royal charter, granted by the King on the advice of the Privy Council on petition

(*y*) Local Government Act, 1894, s. 27.

(*z*) 15 & 16 Geo. V. c. 90. Railways are assessed under 20 & 21 Geo. V. c. 24, by a railway assessment authority of ten members which fixes the total and apportions the amounts among the authorities.

(*a*) Education Act, 1902, s. 1, re-enacted by the Education Act, 1921 (11 & 12 Geo. V. c. 51), s. 3; modified by the Education (Local Authorities) Act, 1931 (21 & 22 Geo. V. c. 6).

(*b*) 38 & 39 Vict. c. 55, ss. 71–90; 48 & 49 Vict. c. 72, ss. 8–10; 53 & 54 Vict. c. 59, s. 32; 9 & 10 Geo. V. c. 35, s. 26; Local Government Act, 1933, ss. 250–252.

(*c*) 45 & 46 Vict. c. 50; amended by Local Government Act, 1933.

from the resident householders. Under the Local Government Act, 1933 (ss. 129—138), procedure is by petition by an urban or rural district council.

The corporation consists of *burgesses* (or *citizens* in the case of a city, a status conferred on boroughs by charter or letters patent), who are the ratepayers of the borough, and the wives or husbands of resident ratepayers, if living with them (excluding aliens), a *mayor*, and aldermen (*d*), and acts through a council composed of the mayor, aldermen, and councillors. The councillors are appointed by the local government electors, and hold office for three years, one-third of their number retiring by rotation in every year (*e*). The borough may be divided into wards, if desired. The qualifications and disqualifications of councillors are analogous to those of district councillors. The aldermen are chosen by the councillors from amongst their own number, and hold office for six years; their number is one-third of the number of councillors (*f*). The mayor is elected annually by the council; he need not be a councillor, but must be duly qualified to be a councillor (*g*); he is a magistrate, *virtute officii* for his year of office and the next year. The council acts largely by committees, but confirms their acts. The council may make by-laws for the borough subject to confirmation by the Home Secretary or in health matters the Minister of Health; it manages the property of the borough, and may levy a rate; in addition, it exercises the powers conferred upon it and the district councils by the Local Government Act of 1894 and various other Acts. In some cases boroughs have separate police forces.

By the County and Borough Councils (Qualification) Act, 1914 (4 & 5 Geo. V. c. 21), any person of either sex may be nominated and elected councillor or alderman of a county council or borough council if he or she has resided within the county or borough for the whole twelve months preceding the election. No person is disqualified for being a councillor of a borough by reason only that he is in Holy Orders or the regular minister of a dissenting congregation (*h*).

Many boroughs and most county boroughs have a separate quarter sessions, with a recorder as judge, who must be a barrister of five years' standing, and is appointed by the King on the advice of the Home Secretary. Separate quarter sessions are now granted by Order in Council under the Municipal Corporations Act, 1882 (ss. 156, 187). Other boroughs may have stipendiary magistrates under that Act (s. 161).

**The County Boroughs.**—These are purely creations of statute; if the inhabitants of a borough exceed 75,000, a bill to give county

(*d*) *Ib.* s. 8; Local Government Act, 1933, ss. 17—23.

(*e*) The election falls on November 1; Local Government Act, 1933, s. 23 (3). For the franchise, see p. 463, note (*l*), *ante*.

(*f*) Half retire every three years; an alderman cannot vote at the election of aldermen: 10 Edw. VII. & 1 Geo. V. c. 19, s. 1; Local Government Act, 1933, ss. 21 (4), 22 (3). The mayor can.

(*g*) Local Government Act, 1933, s. 18 (1).

(*h*) 15 & 16 Geo. V. c. 54. See Local Government Act, 1933, s. 59.

status is permissible (*i*). The borough, however, retains its constitution, and for most purposes is subject to the county sheriff, and contributes to the cost of the county assizes. It has the powers of a borough council and most of those of a county council, including higher education. It is charged with public assistance, appointing a committee with co-opted members (*k*), and it is a rating authority.

The powers of county boroughs and other authorities as to the licensing of public service vehicles and their regulation as to routes, &c. were handed over by the Road Traffic Act, 1930 (20 & 21 Geo. V. c. 43), to Traffic Commissioners in eleven areas in England. Each area has a chairman, selected by the Minister of Transport, and two commissioners, chosen by him from panels annually chosen by (1) county councils, and (2) borough and urban district councils. Appeals lie to the Minister, who has very wide powers to regulate the conditions of grant of licences.

**The County Councils.**—By the Local Government Act, 1888 (*l*), a county council consisting of a chairman, aldermen, and councillors was established in every administrative county. The electorate now includes all occupants of full age of lands and premises within the county and the wives and husbands of resident occupiers, resident with them, with tenants of unfurnished rooms and service occupiers, when the employer does not inhabit the premises. The number of councillors for each county is determined by the Secretary of State (*m*), each county being divided into electoral divisions, which return one councillor each. The councillors are elected triennially, and all retire on March 8 together. No person may be elected or sit if during the preceding twelve months he has received relief for destitution as distinct from medical relief (*n*). The aldermen are elected by the council and constitute one-third of the number of councillors; their term of office is six years, but one-half retire at the end of three years. The disqualification of women under common law was removed by the County and Borough Councils (Qualification) Act, 1914 (*o*). The county council must appoint committees on finance, agriculture, education, housing, public health, child welfare, lunatics and defectives, and public assistance. Co-option is possible for education, public health, housing, and public assistance. In the last case sub-committees,

(*i*) The Local Government Act, 1888, provided for county boroughs, and allowed the ministry to create new boroughs by provisional order. Owing to objections of county councils to loss of control and revenue, this power was removed by 16 & 17 Geo. V. c. 38, s. 1. Distinct from these are the old counties of cities or of towns, which possess separate sheriffs, but otherwise, unless made county boroughs, are practically ordinary boroughs. There are now eighty-eight county boroughs.

(*k*) Local Government Act, 1929 (19 & 20 Geo. V. c. 17), s. 1.

(*l*) 51 & 52 Vict. c. 41; amended by Local Government Act, 1933.

(*m*) *Ib.* s. 2 (3) (a) gave the power to fix members to the Local Government Board: see now Local Government Act, 1933, s. 12.

(*n*) Local Government Act, 1929, s. 10. The same rule applies to membership of public assistance committees and guardians' committees. For other disqualifications, see p. 467, note (*x*), *ante*.

(*o*) 4 & 5 Geo. V. c. 21. As to the previous ineligibility of women, see *Beresford Hope v. Lady Sandhurst* (1889), 23 Q. B. D. 79; and see *D'Souza v. Cobden*, [1891] 1 Q. B. 687.

called guardian committees, must be created, including district councillors, county councillors for the area, and co-opted members. The council must remain in control of raising rates or loans, but can delegate other powers, as in fact it does, meeting in full session rarely. It must have with other officials a county treasurer, county surveyors, coroners, inspectors of weights and measures, medical officer of health, inspector of midwives, education officers, and gas examiners. To secure uniformity of valuation the council appoints a valuation committee, containing representatives of each assessment area, and the Ministry of Health appoints a central committee in an advisory capacity. Its funds are derived essentially from rates and grants, including the General Exchequer Contribution periodically fixed under the Local Government Act, 1929, last revised by the Local Government (Financial Provisions) Act, 1937 (1 Edw. VIII. & 1 Geo. VI. c. 22); loans can be raised with the assent of the Minister of Health; small sums result from fines, fees and property.

The Act of 1888 transfers to the county council most of the powers formerly exercised by the justices in quarter sessions, and some, such as the licensing of playhouses and the administration of the Explosives Act, 1875 (38 & 39 Vict. c. 17), formerly exercised by the justices out of session.

Generally speaking, the business of the county council comes under the following heads: air raid precautions under the Air Raid Precautions Act, 1937; agriculture, destruction of insects and pests; animal diseases; allotments; drainage and sanitation; public health, including sale of milk and dairies; suppression of nuisances; regulation of advertisements; public assistance; education in all its branches, including promotion of physical training and education; motor and other locomotives; pauper lunatic asylums; reformatories and industrial schools; the pollution of rivers; the protection of birds and fish; the appointment of coroners; licences for music, dancing, and racecourses; the administration of the Acts relating to weights and measures; gas meters; it pays the salary of the clerk to the justices, and the expenses of the assizes and quarter sessions; it also exercises certain supervision over parish and district councils under the Local Government Acts of 1894, 1929, and 1933. The control of certain main roads, known as trunk roads (4,500 miles), and bridges was taken over by the Ministry of Transport in 1937 under the Trunk Roads Act, 1936. The counties retain responsibility for roads in rural districts and classified roads (A, 27,100, B, 16,900 miles), less the trunk roads. A council can promote and oppose bills in Parliament, a power possessed by other local authorities, save parish councils, and make by-laws for order and good government, and by provisional orders powers of government departments can be transferred to it.

**Audit of Local Accounts.**—The accounts of parish meetings and of parish, urban and rural, and county, councils are audited by officers appointed by the Minister of Health, and also the accounts of metropolitan borough councils, of joint boards and port sanitary authorities, constituted by provisional orders, of education authorities,

and of assisted housing schemes. The ordinary borough accounts are audited by a councillor, elected by the mayor, and two persons, qualified to be councillors but not in office, elected by the burgesses each year, but this amateur audit is often supplemented by a professional audit, and by the Municipal Corporations (Audit) Act, 1933 (23 & 24 Geo. V. c. 28), now embodied in the Local Government Act, 1933, either the district audit or a professional system can easily be substituted.

The district auditor has very wide powers to surcharge irregular expenditure, and, while local authorities have wide discretion in expenditure on legal ends, they may be surcharged for paying rates of wages unreasonable in amount, or for giving remuneration for past services, or for subscribing to the cost of a march of enemployed as a political demonstration (*p*). The practice has been criticised severely, but it is repugnant to fair dealing that a local authority should levy rates on other workers in order to pay extravagant wages to a favoured class, and such action seems often to be dictated by the mere motive of electoral advantage. From any surcharge of over £500 appeal lies to the High Court; if under to the Court or the Minister of Health, who may, and if so directed must, state a case on a point of law (*q*). The penalty of disqualification for membership of a local authority may be imposed for a period of five years. The Minister of Health does not in fact exercise any control over the auditors, whose action is thus quasi-judicial and of great value in protecting the public from negligence and dishonesty.

**Central Control of Local Government.**—The central authorities control the local authorities in a large number of ways. (1) They have statutory powers to issue orders on a great mass of subjects, education, public assistance, transport, public health, &c. (2) It lies with them to issue provisional orders to extend the powers of public authorities, and to criticise or oppose private bills. (3) They have to approve or revise schemes submitted by local authorities, as under the Education Act, 1921, and the Local Government Act, 1933; to approve fees, *e.g.*, for burial fees, carriage fares, and electricity charges; to approve, with or without changes, proposals for housing, for town planning, for restriction of ribbon development; and to sanction by-laws either general or under the Public Health or Education Acts, &c. (4) They prescribe conditions of qualification for certain offices, medical officers of health, sanitary inspectors, inspectors of weights and measures, teachers and chief constables. (5) They determine a large number of appeals on a great variety of subjects. (6) They have under the Local Government Act, 1929 (s. 51), in addition to earlier

(*p*) *Roberts v. Hopwood*, [1925] A. C. 578; *Roberts v. Cunningham* (1926), 42 T. L. R. (H. L.) 162; *R. v. Roberts*; *Woolwich Borough Council, Ex parte* (1926), 90 J. P. 197; *Magrath, In re*, [1934] 2 K. B. 415; *Davies v. Cowperthwaite* (1938), 159 L. T. 43. H. J. Laski, *Parl. Govt.*, p. 364, ignores the argument from justice.

(*q*) 17 & 18 Geo. V. c. 31. This and 23 & 24 Geo. V. c. 28, are embodied in Local Government Act, 1933, Pt. X. The right of an interested person to inspect accounts through an agent is asserted in *R. v. Bedwelty Urban District Council*; *Price, Ex parte*, [1934] 1 K. B. 333. Ratepayers who have asked for a disallowance can support one before the Court: *Magrath, In re*, [1934] 2 K. B. 415.

Acts, a very wide power of requiring reports. (7) They sanction loans which local authorities desire to raise; the Minister of Health is the normal authority, but some loans are raised under special Acts. (8) Audit is in the hands of the Minister of Health. (9) In certain cases of default in matters of public health the central authority may act or enforce action by *mandamus*, but neither practice is much used. (10) Inspection by officers of the central departments is insisted upon as the condition of important grants. Thus education, of which the State provides normally at least 50 per cent. of the cost, is inspected by the Board of Education; the Home Office pays half the cost of police forces found efficient by its officers; the Minister of Transport is advised as to road grants by his engineers; public assistance and public health are inspected by the Ministry of Health. Under the Physical Training and Recreation Act, 1937 (1 Edw. VIII. & 1 Geo. VI. c. 46), the Board of Education may make grants to local authorities for purposes therewith connected, with the aid of a grants committee appointed by the Treasury. (11) The central authorities procure information and provide for the existence of many expert committees, whose advice is available for the guidance of local authorities.

**Contributions to Local Finance.**—After a series of experiments the Local Government Act, 1929, adopted a new plan to determine the central contribution to local funds, to supplement the amount raised by rates and by fees, tolls, and rents. Police, education, roads, and housing became the subject of special grants and there was devised a general exchequer contribution. Distribution of this sum to county councils and county boroughs depends on (1) the amount of rates and grants lost under the new system, and (2) the weighted population; the factors taken into account are (1) number of children under five in excess of 50 per 1,000, (2) amount by which rateable value is less than £10 a head, (3) excess unemployment, and (4) in the case of counties density or sparsity of population. The municipal boroughs and the urban and rural districts receive their due shares based on population direct from the central government. The 1937 revision of the original arrangement is calculated to aid depressed areas; it gave £54,933,000 in 1938—39. Specific grants are now made also for air raid precautionary services (£2,000,000 in 1938—39), physical training and recreation, unemployment grants and loans, rural water supplies, and special areas.

**Local Government Officers.**—Collectively the local authorities employ very large numbers of servants, but out of 1,783, about 1,234 do not need more than twenty or so, who are in part necessarily of technical qualifications. The greater authorities have set up establishment committees to secure proper recruitment, to provide for the training and promotion of trainees, to arrange scales of salaries, to settle conditions of employment, &c. The question of introducing university graduates into the service has been often considered, but in only small measure has the position been worked out. Manchester, Birmingham, Oldham, Sheffield, the London County Council, have done something effective. The town clerk in a great municipality is usually a lawyer,

and may or may not be an expert administrator; it is probable that he ought to be given a wider control of all the local activities. As it is, the several departments, like the public health department under the medical officer of health, or the education department, under the director of education, are mainly autonomous. There is also some lack of co-ordination in great authorities: the mayor's term of office is too short, and his formal duties take up his spare time. The finance committee under the treasurer does not attempt general planning, and effective general purposes committees are few. Regular pension schemes have been imposed by central authority.

### *County Officials.*

**Sheriffs.**—The sheriff was originally the King's reeve, who was made the deputy of the earldorman or earl, even in the Anglo-Saxon period, as the royal representative in the shire. Used at first for important criminal judicial functions, he gradually was reduced in importance, partly in favour of the justices of the peace (*r*). But he still retains some functions of executive character. The mode of appointment and duties of the sheriffs are now principally regulated by the Sheriffs Act, 1887 (*s*). Every county must have a sheriff, and they are appointed under the Act in accordance with the ancient usage.

On November 12 in each year the Lord Chancellor, the Chancellor of the Exchequer, the Lord Chief Justice, the Lord President of the Council, and certain other privy councillors, or any two of these dignitaries, attend with the judges, or any two or more of them, at the Royal Courts of Justice (*t*). A list of the names of persons fitted to be sheriff of each county, "having sufficient land within his county or bailiwick to answer the King and his people," is submitted for each county by the senior judge who visited the county at the previous summer assizes. Excuses are considered, and finally three names are selected. The roll is submitted to the King in Council, who selects the sheriffs by pricking off their names upon the list. The royal warrant of appointment is then sent to the sheriff-elect, and a copy to the clerk of the peace.

The sheriff is appointed for one year, and holds office *durante bene placito*. On appointment he must make the declaration prescribed by the Act (*u*). His office is not affected by the demise of the Crown (*x*). The same person may not be chosen twice in three years if there is any other person in the county qualified (*y*).

The sheriff is the returning officer for county elections (*z*), and performs certain duties with regard to election petitions (*a*). He may no longer hold criminal pleas, and may not act as a justice of the

(*r*) See p. 287, *ante*.

(*s*) 50 & 51 Vict. c. 55. See J. S. Wilson, E. H. R., xlvii, 31—45.

(*t*) S. 6.

(*u*) Ss. 7 (1), 23 (3); Sched. II.

(*x*) Ss. 3, 6, 7.

(*y*) S. 5. In Lancaster the sheriff is appointed by the King as Duke of Lancaster; in Cornwall by the Duke of Cornwall. See *The Prince's Case* (1606), 8 Rep. 1. The Sheriff of Durham was formerly appointed by the bishop, but since 1836 by the Crown (6 & 7 Will. IV. c. 19).

(*z*) 7 & 8 Will. III. c. 25, s. 2.

(*a*) See 31 & 32 Vict. c. 125, ss. 7, 30.

peace (b). Acting through the under-sheriff, to whom the writs are actually delivered, and bailiffs, he executes criminal process, including the due execution of those sentenced to death, and all writs and processes issuing out of the superior Court (c), especially those of *fiery facias*, *elegit*, and *capias*, which are different forms of execution. He is charged with the duty of presiding over the jury which assesses unliquidated damages (e.g., in breach of promise cases) or fixes compensation for compulsory acquisition of land. He is legally responsible for any illegality of his subordinates, with certain protection for innocent error (d). He also is bound to collect Crown debts such as fines and forfeited recognisances and bonds. In executing a criminal process he may break open an outer door (e), but not in civil cases (f), except the door of an outhouse. The sheriff also summons jurors for the superior Courts (g).

The principal duties of the sheriff are performed by subordinates, viz., the under and deputy sheriffs and bailiffs. Every sheriff must appoint a sufficient deputy, resident or having an office within one mile of the Inner Temple Hall, for the receipt of writs, granting warrants thereon, making returns thereto, and generally for the acceptance of all rules and orders to be made on or touching the execution of any writ or process directed to the sheriff (h). The actual execution of the writ or process is effected by the under-sheriff through sheriffs' officers or bailiffs, who, upon appointment, must make the declaration provided by the Act (i).

Every sheriff must appoint an under-sheriff, who generally performs the actual duties of the sheriff and takes his place on the death or suspension of the sheriff himself (k).

The duties of the bailiff of a franchise are either exercised personally or by a deputy bailiff (who must reside in or near the franchise), and by bailiffs corresponding to the under-sheriff and sheriffs' officers (l). In the case of a liberty or franchise the writs are directed to the sheriff in the ordinary way, and he issues his precept to the bailiff of the franchise. The principal personal duties of the sheriff are, in case of resistance to the execution of a writ, to go in proper person with the power (*posse*) of the county (it being the duty of all persons in the county to assist him), and arrest the resisters and commit them (m). He also goes to meet the judges, attends them at assize, and provides for their lodging and retinue, and in certain cases for the attendance of men-servants in liveries (n).

The sheriff of a county of a city, or a county of a town (other than London, where the sheriffs are elected by the liverymen, subject to

(b) 50 & 51 Vict. c. 55, s. 17.

(c) *Ib.* ss. 10, 11. For his action as to prisoners sentenced at the Central Criminal Court, see 44 & 45 Vict. c. 64, s. 2.

(d) *Lee v. Dangar*, [1892] 2 Q. B. 337; *Bagge v. Whitehead*, [1892] 2 Q. B. 355.

(e) 42 & 43 Vict. c. 59, s. 3.

(f) See *Burdett v. Abbott* (1811), 14 East, p. 154.

(g) 50 & 51 Vict. c. 55, s. 12.

(h) *Ib.* s. 24.

(k) Ss. 23, 25.

(m) Ss. 8, 9.

(n) 50 & 51 Vict. c. 55, s. 9.

(i) S. 26, Sched. II.

(l) See s. 34.

the Crown's approval), is appointed by the town council under the Municipal Corporations Act, 1882 (o).

**The Lord Lieutenant.**—Under the Tudors the sheriffs lost their remaining military capacity in respect of the militia to the lord lieutenants of counties, who came to command the militia, yeomanry, and volunteers, were responsible for their efficiency, and appointed and removed officers. By the Regulation of the Forces Act, 1871 (p), the powers of the lord lieutenant were revested in the Crown. The Militia Act, 1882, provides that His Majesty shall from time to time appoint lieutenants for the several counties in the United Kingdom (q). They are accordingly appointed by letters patent under the Great Seal, and are usually, though not necessarily, the same person as the *custos rotulorum*. The lieutenant is normally president of the county association charged with functions as to the forces under the Territorial and Reserve Forces Act, 1907 (r), and appoints deputy lieutenants, who are normally of high social rank or at least of considerable property and now are expected to have had military service or to have aided the local forces (s). He recommends, with the aid of an advisory committee, persons for appointment as justices of the peace; he is a justice for the county *ex officio*, and recommends the *custos rotulorum*.

**The Custos Rotulorum.**—This functionary, who is always a person of high standing in the county, and is usually the same person as the lord lieutenant, was appointed originally by the Lord Chancellor. Since the reign of Henry VIII. he has been appointed by the Crown under the royal sign manual (t). He is nominally the keeper of the records for the county, both of sessions of the peace and commissions of the peace, but in reality that duty is performed by the clerk of the peace (u), whom formerly he appointed.

**The Clerk of the Peace.**—This functionary, practically always a solicitor, was formerly also clerk of the county council, and was therefore appointed by the standing joint committee of the county council and the county justices (x), but now by quarter sessions usually acting through a committee, composed of the members serving on the standing joint committee (y); in boroughs which

(o) 50 & 51 Vict. c. 55, s. 36; Municipal Corporations Act, 1882, s. 170.

(p) 34 & 35 Vict. c. 86, s. 6.

(q) 45 & 46 Vict. c. 49, s. 29.

(r) See p. 369, *ante*.

(s) 45 & 46 Vict. c. 49, ss. 30, 33—35, 52, 53.

(t) 37 Hen. VIII. c. 1, s. 1; 1 Will. & M. c. 21, s. 3.

(u) See the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 61 (1) (a); Local Government (Clerks) Act, 1931 (21 & 22 Geo. V. c. 45), s. 5 (3). Other county records are under the clerk of the county council: *ib.*, and Local Government Act, 1933, s. 279.

(x) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 83 (2).

(y) In *Leconfield v. Thornely*, [1926] A. C. 10, it was held that the clerk held during good behaviour, though notice was included in the agreement with the county council. Hence the appointments were made distinct by Local Government (Clerks) Act, 1931, and the clerk of the council may be but is not necessarily clerk of the peace, but holds the offices on distinct tenures. He holds at the pleasure of the council, but can be dismissed only with the permission of the Minister of Health: Local

have a separate quarter sessions he is appointed by the borough council, and holds office during good behaviour (z).

The principal duties of the clerk of the peace are as follows:—

- (1) He represents the *custos rotulorum* with regard to the custody and charge of the judicial records of the county, subject, however, to the direction of the *custos rotulorum* and the quarter sessions; administrative records are in the charge of the county clerk. In boroughs and district councils care of administrative records rests with the appropriate clerk (a).
- (2) He acts as clerk of the county council if so appointed (b), and as such supplies the Secretary of State or Ministry of Health with returns or information required by either House of Parliament, receives lists of the Parliamentary and local government electors as prepared at the annual revision Court, and prints and distributes them, attends to the deposit of plans and documents under various Acts, and receives the jury list. In all these matters he is subject to the direction of the county council (c).
- (3) At quarter sessions he advises the justices, prepares indictments, calls over and swears the petty jurors, arraigns prisoners, charges the jury, and receives the verdict (d). He receives and is entitled to an account of all fines imposed (e).

**Clerks to Justices and Magistrates.**—These officials usually aid the justices at petty sessions, advising them and taking down the depositions, and like functions are performed in the boroughs. The office is held by a solicitor, and the salary is provided by the county or borough council (f). Provision for superannuation for these and other local government officials is provided in the Local Government Superannuation Act, 1937 (1 Edw. VIII. & 1 Geo. VI. c. 68).

**The Police Organisation.**—The early organisation of frankpledge and the later statutory provisions for the appointment of parish constables were manifestly inadequate, and from 1839 (2 & 3 Vict. c. 93) effective police forces had to be raised under new Acts. With the exception of the Metropolitan Police, about 19,500 strong, which is controlled by the Secretary of State for Home Affairs who appoints the chief commissioner, the forces remain local, but the Home

Government Act, 1933, s. 100; but his tenure can be on agreement (s. 121). The clerk of the peace can be removed by quarter sessions for misconduct in office without appeal; for other misconduct subject to appeal to the High Court: 21 & 22 Geo. V. c. 45, s. 4 (5); he retires normally at age sixty-five.

(z) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 164 (2).

(a) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 17 (3); Local Government Act, 1933, s. 279 (2).

(b) *Ib.* s. 83 (1); 21 & 22 Geo. V. c. 45, s. 2.

(c) *Ib.* s. 82 (6); 21 & 22 Geo. V. c. 45, s. 5 (2).

(d) See Archbold, Quarter Sessions, p. 82.

(e) 11 & 12 Vict. c. 43, s. 31; 50 & 51 Vict. c. 71, s. 19 (4).

(f) See 40 & 41 Vict. c. 43, ss. 5, 7; 45 & 46 Vict. c. 50, s. 159; 51 & 52 Vict. c. 41, s. 84; 4 & 5 Geo. V. c. 58, s. 34; 21 & 22 Geo. V. c. 45, s. 8.

Secretary has a wide control, justified by the fact that since 1856 part, and now half of the cost is defrayed from central funds. His assent is necessary for fixing numbers, there being about 37,000 in England outside London, for rules for duties, and, after consulting representatives of the Police Federation created by the Police Act, 1919, chief officers and local authorities, he regulates the government, mutual aid, pay, allowances, pensions, clothing expenses, and service conditions of members of the force. He appoints inspectors whose certification of efficiency determines payment of the grant (*g*). He determines rules for use of policewomen. For the Metropolitan Police he has created a Metropolitan Police College at Hendon, which trains as officers both men selected by examination and men already serving in the ranks; a special system of short service enlistment was tried, but dropped in 1939. For aid in scientific matters there is the Metropolitan Police Laboratory also at Hendon, and a department dealing with records of finger prints. The Criminal Investigation Department of this force, by his direction, is always prepared to aid local police forces in detection of crime, but local forces are autonomous and remain free to accept or reject the possibility of "calling in the Yard."

In boroughs the Watch Committee appoints and dismisses the police (*h*), but the Home Secretary must approve the appointment of the Chief Constable. This applies even to the City of London Police and its Commissioner, the control there being vested in the Court of Common Council; amalgamation with the Metropolitan Police is precluded by sentimental reasons, as elsewhere; the Government's policy is to consolidate the police forces and to extinguish small forces (*i*). In the counties a chief constable is appointed by the joint committee of the county council and of the county justices in quarter sessions, subject to the approval of the Secretary of State (*k*). The chief constable is the head officer of the county police and makes reports to the county justices on such matters as they may require (*l*). He also appoints and dismisses superintendent and petty constables (*m*); appointments must be approved at petty sessions. Provision is made

(*g*) 51 & 52 Vict. c. 41, s. 25; 9 & 10 Geo. V. c. 46, s. 4. Police pensions are regulated by the Police Pensions Act, 1921 (11 & 12 Geo. V. c. 31), and a right of appeal against dismissal by a local authority to the Home Secretary is given by the Police (Appeals) Act, 1927 (17 & 18 Geo. V. c. 19). For London, see 23 & 24 Geo. V. c. 33.

(*h*) 10 & 11 Vict. c. 89, s. 6; 45 & 46 Vict. c. 50, s. 190 (1), (2); *Cooper v. Wilson*, [1937] 2 K. B. 309.

(*i*) House of Commons Report 106 of 1931—32. In 1932 there were forty-nine borough forces and seventy-two county borough forces, and only three county joint committees. The Report recommends the extinction of separate forces for areas under 30,000 inhabitants; the limit of 20,000 is provided under the Local Government Act, 1933, s. 136.

(*k*) 2 & 3 Vict. c. 93, ss. 4, 24; 19 & 20 Vict. c. 69, s. 3; 51 & 52 Vict. c. 41, s. 9.

(*l*) 2 & 3 Vict. c. 93, s. 17; 3 & 4 Vict. c. 88, s. 31.

(*m*) 2 & 3 Vict. c. 93, s. 6; 3 & 4 Vict. c. 88, s. 26. Special constables are males between twenty-five and fifty-five; power to enrol lies with two or more justices of the peace, report being made to the Home Secretary and Lord Lieutenant; 1 & 2 Will. IV. c. 41; 5 & 6 Will. IV. c. 43; in boroughs, 45 & 46 Vict. c. 50, s. 196, in London area, 53 & 54 Vict. c. 45, s. 28; for regulation by Order in Council, which may be annulled on address, see 4 & 5 Geo. V. c. 61; 13 & 14 Geo. V. c. 11, ss. 1, 2; Order in Council, July 30, 1923 (S. R. & O., No. 905, p. 147).

for the enrolment of special constables, especially, but not only, where there is danger of riot; under the Riot (Damages) Act, 1886 (49 & 50 Vict. c. 38), compensation for injury, stealing or destruction of property caused by riotous and tumultuous assemblies is fixed by the county council and paid out of the police rate.

Policemen are liable for their own wrongdoing, criminally and civilly, but the authority which appoints is not responsible, as was held in a case where efforts were made to obtain damages from a corporation because of wrongful arrest, on the ground that the police were public servants and officers (*n*). They have, as already noted, wider powers of arrest than citizens generally, and are protected by the Constables' Protection Act, 1751, in the execution of warrants *prima facie* regular, and also by the Public Authorities Protection Act, 1893 (*o*). Politically, of course, police misconduct may be taken up in the Commons or Lords, and the improper use of interrogation in the case of Miss Savidge led to an important investigation by a committee which made useful recommendations to secure that the rules of the judges, which forbid this use of police inquisitions of suspects shall be carried out.

Prisons, Borstal Institutions, and the Criminal Lunatic Asylum at Broadmoor are under the control of the Home Secretary, who acts through the Prison Commission at the Home Office.

### *Scotland.*

**The Acts of Union.**—By the Acts for the union of England and Scotland, 1707, passed in the two kingdoms to give effect to a treaty of union arranged by Parliamentary authority by commissioners, in view of the danger of the separation of the countries on the death of Queen Anne, the two kingdoms became united as from May 1, 1707, into one kingdom, under the name of Great Britain, with a common Parliament. Pursuant to the Act, Scotland is represented in the House of Lords by sixteen representative peers, elected in the manner prescribed by the Act (*p*), and in the House of Commons by seventy-four members, the original allowance of forty-five having been increased by several statutes; the Parliamentary franchise is now, however, the same for the two kingdoms except with regard to certain modifications which are not very important (*q*).

The Act placed the two kingdoms on the same footing with regard to trade and navigation, thus removing a bitter sense of grievance in Scotland against exclusion from English colonial trade, and also with regard to customs and excise, with a few minor differences, which

(*n*) *Fisher v. Oldham Corporation*, [1930] 2 K. B. 364. On the *Savidge Case* and its sequel, see Parl. Pap., Cmd. 3231, 3297; and volumes of evidence of the Royal Commission on Police Powers and Procedure, 1928—29. H. J. Laski, *Parl. Govt.*, p. 376, suggests bias on the part of the police, citing the *Urquhart Case* (W. H. Thompson, *Civil Liberties*, pp. 60 f.); the *Thurlow Square Case* (special report of National Council of Civil Liberties), and C. Muir, *Justice in a Distressed Area*, ch. i.

(*o*) See p. 37, *ante*.

(*p*) 6 Anne, c. 11, s. 25 (2). As to the mode of election, see *ante*, p. 83.

(*q*) As to these modifications, see 7 & 8 Geo. V. c. 64, s. 43; 18 & 19 Geo. V. c. 12, s. 1, and Sched.

have since been removed, and fixed the proportion which Scotland was to contribute to the land tax (*r*). The Scottish Court of Session and the other Scottish Courts and system of laws then existing were preserved by the Act, subject to any future alterations to be made by Parliament, and no Scottish causes are cognizable by the English Courts (*s*). Appeal lies, however, to the House of Lords from the Scottish Court of Session, although this seems not to have been intended by the Scots negotiators.

**The Church of Scotland.**—The preservation of the Presbyterian Church in Scotland with the form of government established by a Scottish Act was made an essential term of the union, but it is only in this sense and in the recognition accorded to the Church Courts as forms of public jurisdiction (26 & 27 Vict. c. 47), that the Church in Scotland can be said to be an established Church (*t*). The Church enjoys government (1) by kirk sessions, consisting of the minister and lay elders; (2) by presbyteries, composed of ministers and representative elders from a number of parishes, together with any university professors in the area; this body ordains and supervises ministers; (3) by synods representing the presbyteries as grouped; and finally by the General Assembly, which is partly clerical and partly lay, being composed of a quarter of the ministers and a like number of elders from the presbyteries. All legislation and final jurisdiction, including appeals from ministers against removal from office, rests with the Assembly, which has also wide administrative powers. The power of the Church to decide its own doctrines is rendered absolute, within the bounds of Trinitarian Christianity, by a statute of 1921 (*u*), which was passed to render possible union with the major portion of the United Free Church on October 2, 1929; that Church itself was a union formed in 1900 of the United Presbyterian Church and the major portion of the Free Church of Scotland, a body which had separated from the Church of Scotland in 1843 on the question of relations with the State and lay patronage of the clergy (*x*). The property rights of the Church are regulated by statute (*y*). A notable change has consisted since union in the creation of presbyteries outside Scotland, that of the synod of England,

(*r*) S. 9.

(*s*) *Wansborough Paper Co., Ltd. v. Laughland*, [1920] W. N. 394, indicates the limits of this rule: Dicey and Keith, *Conflict of Laws*, pp. 250, 479.

(*t*) As to the Episcopal Church in Scotland, which is a dissenting body, see *ante*, p. 415.

(*u*) 11 & 12 Geo. V. c. 29.

(*x*) For the history, see *Free Church of Scotland v. Overtoun*, [1904] A. C. 515; May, *Const. Hist.*, ii, 280 ff. Lay patronage was introduced (in breach of the Act of Union, 1707) under Anne, and, modified by 6 & 7 Vict. c. 61, was repealed in 1874 (10 Anne, c. 21; 37 & 38 Vict. c. 82, s. 3). It led to a series of secessions from 1733, two of which, in 1847, resulted in the creation of the United Presbyterian Church. There remains outstanding a remnant of the Free Church, which in the case cited was adjudged to be entitled to all the endowments of the Church, so that Parliament had to intervene to redistribute them by Act, 5 Edw. VII. c. 12. The United Free Church still exists and is increasing in strength; see also 22 & 23 Geo. V. c. 26, regarding the University Professorships.

(*y*) Church of Scotland (Property and Endowments) Act, 1925 (15 & 16 Geo. V. c. 33), amended by 23 & 24 Geo. V. c. 44. The General Trustees, who are in charge of the property, act under 11 & 12 Geo. V. c. cxxv, and 22 & 23 Geo. V. c. xxi.

and those of Northern Europe, Southern Europe, Spain and Portugal, and certain Indian and Colonial presbyteries, raising the number from sixty-six at union to eighty-three.

Church legislation in Scotland is not subject to royal assent. The King is represented at the annual session of the General Assembly by a High Commissioner, who may not be a Roman Catholic and who receives £2,000 to cover his expenses. But he has no power, and merely serves to perpetuate the royal interest and duty, which is accentuated by the King's duty to take on accession the oath for the preservation of the Scottish Church. The regent under the Regency Act, 1937, is under a like obligation, and may not assent to a bill to alter the Church constitution. In Scotland the King always attends the Church of Scotland's services, to which, as essentially Protestant, Queen Victoria was deeply attached.

**Executive Government.**—The executive government of Scotland is vested in the Crown, and Scottish affairs are now conducted by the Scottish Office, at the head of which is the Secretary of State for Scotland, who is a member of the Cabinet, and goes out of office with the Ministry (2). The office is now in the main located in Edinburgh.

**Scots Law.**—Scotland has its own distinctive system of law, which derives from various sources Celtic, Anglo-Norman, Norse custom, Roman and canon law, feudal law, developed by institutional writers like Lord Stair, in whose honour has appeared in 1936 "An Introductory Survey of the Sources and Literature of Scots Law." It has been affected by judicial interpretation, which has introduced a good deal of English law, and many statutes now apply alike to both countries. But there are fundamental differences in many matters of procedure and substance, though England has in 1937 borrowed part of the Scots law of divorce.

**Judicial System.**—The judicial system of Scotland is distinctive. The Court of Session is composed of two Houses: the Inner of eight judges sits in two divisions, one under the Lord President, the other under the Lord Justice Clerk; it has final jurisdiction, subject to appeal to the House of Lords. There is a separate Scottish Land Court with a special jurisdiction. The Outer division of the Court of Session consists of five judges, who sit separately in first instance causes. Locally the sheriff substitutes sit, with wide civil and criminal jurisdiction, including power to impose sentences of two years' imprisonment with hard labour; appeal lies either direct or through the sheriff principal, who is a judge of appeal, not of whole time service, to the Inner House in civil causes. Divorce, murder, treason and rape are excluded from their jurisdiction. Higher criminal jurisdiction and jurisdiction on appeal rest with the High Court of Justiciary, composed of the Lord Justice General, an office now combined with that of President, the Lord Justice Clerk, and all the judges of the Court of Session, who sit singly in first instance, with a jury of fifteen, and in a Court of two or more on appeals from the lower Courts. A Court of

Criminal Appeal from the High Court dates from 1926 (26 & 27 Geo. V. c. 15); on occasion the whole Court may be convened to consider a case of special complexity; thus eleven judges sat in January, 1939, to consider the competence of a life sentence for manslaughter. All prosecutions in Scotland are official, by the Lord Advocate and advocates deputes in the High Court, by procurators fiscal in the sheriff's Court. Jury decisions are by majority of fifteen, and a verdict of "not proven" is allowed, which is final, the accused being released. Civil juries, when used, also decide by majority, but the number is twelve.

The Scots legal profession is divided between advocates, who are in like position to barristers, and solicitors, of varying description, but like duties; in Aberdeen there are advocates who are a branch of the solicitors.

**Local Government.**—Scotland does not come under the Acts regulating local government in England and Wales. County and parish councils were, however, established in Scotland by the Local Government (Scotland) Acts of 1889 and 1894 respectively (*a*), and the reforms effected in English local government in 1929 were applied in modified form in the Local Government (Scotland) Act, 1929 (19 & 20 Geo. V. c. 25). The Boards which formerly dealt with health, agriculture, and prisons in 1928 were converted into departments under the full control of the Secretary of State (*b*), and are now divisions of his office. Justices of the Peace are still—anomalously in some ways—appointed by the Lord Chancellor on the recommendation of the Lord Lieutenants. They have only petty jurisdiction, and this applies also to the burgh magistrates or bailies, all important cases going to the sheriff.

### *Ireland.*

**The Act of Union, 1800** (*c*).—Under this Act and an Act passed by the independent Parliament of Ireland, over which legislative power had been renounced by the Imperial Parliament in 1782—83 (*d*), the kingdoms of Great Britain and Ireland were united as from January 1, 1801, into one kingdom, under the name of "the United Kingdom of Great Britain and Ireland," with one Parliament for the two kingdoms. By the terms of Art. 4 of the Act, Ireland was to be represented in the House of Lords by four spiritual and twenty-eight temporal peers, but on the disestablishment of the Irish Church in 1869 (32 & 33 Vict. c. 42) the Irish bishops lost their right to sit, and Ireland was then represented in the House of Lords by the twenty-eight temporal peers. In the Commons Ireland was to be represented by 100 members; this number was subsequently increased to 105, and, except during the disenfranchisement of the boroughs of Cashel and Sligo for corruption in 1870 (*e*), it remained at 105 until 1920.

(*a*) 52 & 53 Vict. c. 50; 57 & 58 Vict. c. 58.

(*b*) Reorganisation of Offices (Scotland) Acts, 1928 (18 & 19 Geo. V. c. 34, s. 1 (1)), and 1939.

(*c*) 39 & 40 Geo. III. c. 67; 40 Geo. III. c. 38 (Irish Act).

(*d*) 22 Geo. III. c. 53; 23 Geo. III. c. 28.

(*e*) 33 & 34 Vict. c. 38.

By the Act of Union the churches of England and Ireland were united in one Protestant Episcopal Church, and the continuance of the established Church of England and Ireland was declared to be an essential and fundamental part of the union. The Irish Church was, however, disestablished in 1869 (*f*), in spite of this provision. The United Kingdom and Ireland were placed on the same footing by the Act with regard to trade, navigation, and customs (*g*), but the two countries were to contribute separately to the general expenditure of the United Kingdom in the proportion of fifteen to two (*h*). This continued until the year 1818, when the revenues of the two countries were consolidated into one fund and applied indiscriminately to the service of the United Kingdom (*i*). Ireland retained its own judicial institutions and system of laws, and had a Supreme Court of Judicature, divided into a High Court of Justice, the latter comprising the Chancery and King's Bench Divisions, and a Court of Appeal (*k*). Appeal from the Court of Appeal in Ireland lay to the House of Lords. The head of the executive in Ireland was the lord lieutenant, whose office was not created by the Act of Union, but had been in existence under various names since the reign of Henry II. The lord lieutenant was assisted formally by a Privy Council, consisting of a large number of members appointed by the Crown, but his duties were, for the most part, confined to merely formal executive acts, and to ceremonial, the real person of importance being the Secretary for Ireland, who was normally a member of the Cabinet, the head of the Irish Office, and controlled the policy of the Irish executive.

**The Government of Ireland Acts, 1914 (*l*) and 1920 (*m*).**—This arrangement, however, proved increasingly unpopular in Ireland, and from 1880 the question of Home Rule became a vital issue of British politics, but Mr. Gladstone's Bill in 1886 resulted in disunion in the Liberal Party, and that of 1893 was rejected by the House of Lords. The matter, however, was revived in 1911, when the passing of the Parliament Act (1 & 2 Geo. V. c. 13) removed that difficulty. The passage, however, of the proposed measure aroused deep feeling and risk of rebellion in Ulster, and efforts were made under the authority of the King to reach accommodation. This failed, but the outbreak of war secured compromise. The Act was passed on September 18, 1914, but by a Suspensory Act (*n*) its operation was suspended, and it never came into operation.

The Irish Parliament was to consist of the King, the Irish Senate, and the Irish House of Commons, and a very considerable measure of responsible government in local matters, without fiscal autonomy, was conceded, but the supreme power and authority of the Imperial Parliament was to remain unaffected and undiminished over all

(*f*) 32 & 33 Vict. c. 42. As to the present position of the church in Ireland, see *ante*, p. 414.

(*h*) *Ib.* Art. 7.

(*k*) The result of the Judicature (Ireland) Acts of 1877, 1887 and 1897 (40 & 41 Vict. c. 57; 50 & 51 Vict. c. 6; 60 & 61 Vict. cc. 17 and 66).

(*l*) 4 & 5 Geo. V. c. 90; Oxford, Fifty Years of Parliament, ii, 132—158.

(*m*) 10 & 11 Geo. V. c. 67.

(*g*) 39 & 40 Geo. III. c. 67, Art. 6.

(*i*) 56 Geo. III. c. 98.

(*n*) 4 & 5 Geo. V. c. 88.

persons, matters, and things in Ireland and every part of the same (o). This measure of concession was rejected by the growing Nationalist feeling of Southern Ireland, in which a rebellion broke out, headed by the members elected to Parliament at the election of 1918. As an effort to conciliate malcontents, by the Government of Ireland Act, 1920 (p), which repealed the Government of Ireland Act, 1914, provision was made for a legislature, executive and judicature for Northern Ireland, comprising six of the counties of the Province of Ulster, with the boroughs of Belfast and Derry, and for Southern Ireland, comprising the remainder of the kingdom. Until the establishment of a Parliament for the whole of Ireland there was constituted a Council of Ireland for the purpose of bringing about harmonious action between the Parliaments and Governments of Northern and Southern Ireland. The number of members to be returned by Irish constituencies to serve in the Parliament of the United Kingdom was fixed at forty-six, of whom thirty-three were to represent Southern Ireland and thirteen to represent Northern Ireland. Only the latter have taken and still retain their seats, which legally may be held as well as a seat in the Parliament of Northern Ireland.

**Northern Ireland.**—By the Government of Ireland Act, 1920, which has been amended in minor detail, a Parliament of Northern Ireland is established consisting of His Majesty, the Senate and House of Commons. The Commons consists of fifty-two members, now elected (save for the University) under 19 Geo. V. c. 5, in forty-eight single-member constituencies, proportional representation having been resented from the first and deliberately (except for the University) abolished, on the same franchise as in England, but with a residential qualification of three years under 18 Geo. V. c. 24, and with votes for all peers (peeresses having been given votes in the constitution of 1920); the Senate consists of twenty-four members elected by the Commons by proportional representation and two mayors *ex officio*. Elected members hold office for eight years, half retiring each four years. In case of rejection of ordinary bills by the Senate in two consecutive sessions, the issue is decided by a joint session; in money issues, the joint session can be held forthwith. The Commons sits for five years; it has initiative in finance, and the Senate cannot amend money bills. Parliament has power to make laws for peace, order, and good government, but not to make laws in respect of the Crown, the making of peace or war, the naval, military or air force, treaties, foreign relations, dignities, treason, alienage, external trade (save as regards grading of produce for export), quarantine, navigation, including air navigation, submarine cables, wireless telegraphy, light-

(o) 4 & 5 Geo. V. c. 88, s. 1 (2).

(p) 10 & 11 Geo. V. c. 67. The Act is amended by the Northern Ireland (Miscellaneous Provisions) Acts, 1928 (18 & 19 Geo. V. c. 24), and 1932 (22 & 23 Geo. V. c. 11), and the Irish Free State (Consequential Provisions) Act, 1922 (13 Geo. V. sess. 2, c. 2). The Council of Ireland was abolished in 1925 (15 & 16 Geo. V. c. 77), its powers as to railways, fisheries and contagious diseases of animals being given to Northern Ireland. It is made clear by the Air Raid Precautions Act, 1938 (1 & 2 Geo. VI. c. 6), that Northern Ireland can legislate on this point.

houses, buoys and beacons, coinage, legal tender, weights and measures, copyright, patents, trade-marks, and some other matters, such as, for a time, the post office, trustee savings banks, designs for stamps, the Acts as to land purchase, the Supreme Court of Judicature and Court of Criminal Appeal, and registration of deeds. An important decision (*q*) of the House of Lords has determined that the Milk and Milk Products Act, 1934, is not invalid because, though intended to secure pure milk by providing for inspection of dairies, it incidentally cuts off trade with the areas outside the territory. Customs and excise, income tax and surtax are reserved subjects; the net revenue therefrom is paid over by the Imperial Government after deducting the cost of the reserved services and a contribution—at present nominal—to Imperial funds. Revenue is therefore raised mainly by death duties, stamp duties, motor vehicle, entertainment, excise licences (other than those reserved), and mineral rights duties. Only about 21 per cent. of the revenue comes from these sources as opposed to 75 per cent. reserved, but 84 per cent. of the expenditure is under Irish control. The total of the Imperial contribution is decided by a Joint Exchequer Board, which at present acts on a very generous estimate of proper expenditure for local purposes. The Act prohibits the making of laws interfering with religious equality, taking property without compensation, &c. It gives no general constituent power.

The executive power is now vested in a governor, the Duke of Abercorn, whose tenure of office is six years, but who has been re-appointed in 1928 and 1934, replacing the lord lieutenant. He acts on the advice of the Executive Committee of the Privy Council, which is the Cabinet; Ministers, who number seven and have aid from a like number of Parliamentary secretaries, must be or become members of Parliament in six months, and may speak in either House. The Governor has the power of pardon on instructions similar to those in force in the Dominions.

There is a Supreme Court of five judges, consisting of a High Court and Court of Appeal, whence appeal lies to the House of Lords, and a Court of Criminal Appeal was set up in 1930 (20 & 21 Geo. V. c. 45). These Courts, with the Railway and Canal Commission and the Land Purchase Commission, are controlled by the Imperial Government. Issues of constitutional power to legislate may be referred to the Privy Council for decision by the Governor; this power was first used in 1936, when it was ruled that the Parliament could compel Belfast to levy an education rate (*r*), and that this was not equivalent to imposing an income tax.

The common law of Northern Ireland is English law, but there has been much separate statutory enactment, and that is steadily increasing.

The Home Secretary is the Minister of the Crown responsible for the conduct of relations between the United Kingdom and Northern Ireland.

(*q*) *Gallagher v. Lynn*, [1937] A. C. 863.

(*r*) *Government of Ireland Act Reference, In re*, [1936] A. C. 352.

*The Channel Islands.*

The Channel Islands and the Isle of Man, together with the United Kingdom, make up the British Islands.

**Constitutional Position.**—The Channel Islands, Jersey, Guernsey, Alderney, and Sark, originally formed part of the Duchy of Normandy and became incorporated in the dominions of the Crown of England at the time of the Conquest, William the Conqueror being Duke of Normandy. They are now the only portion of that territory remaining to the Crown, relations with them being controlled by the Home Secretary.

The islands have from the earliest times enjoyed peculiar liberties, being exempt from the general scheme of taxation, and possessing legislative, executive, and judicial institutions of their own. Their original charter of liberties and their present constitution is said to have been granted to them by King John, as a reward for their loyalty in not joining with the rest of Normandy when that territory became reunited to the French Crown. There seems to be some doubt as to this (s), but in any event their liberties and institutions, as they then existed, were fully recognised and confirmed by the charters of succeeding monarchs (t). Moreover, despite the failure of the islands to make a contribution to Imperial war expenditure, it was decided not to legislate to impose taxation by Imperial Act, though subventions to local militia were stopped.

Jersey, the most important of the islands, and Guernsey have legislative and judicial institutions of their own, whilst Alderney and Sark, though having their own institutions, are subject to Guernsey. The Channel Islands are bound by Acts of the Imperial Parliament, and Acts relating to the islands are sent by the clerk of the Privy Council to the Royal Courts of the islands to be registered, published, and put into execution (u). The registration, however, of an Act so transmitted is not essential to its operation in the islands (x). An important question has arisen as to whether the Crown may, by prerogative, legislate for the islands by Order in Council, without the assent of the States, and the question was raised before the Judicial Committee of the Privy Council in 1853, and again in 1894. That body, however, though they expressed serious doubts as to whether certain Orders in Council should be made binding on the islands without the assent of their legislatures, did not definitely decide the point (y). The Crown, however, has unquestionably the prerogative

(s) See Le Quesne, *Const. Hist. of Jersey*, pp. 52 ff.

(t) *Ib.* pp. 116 ff.

(u) Order in Council, July 1, 1731.

(x) Order in Council, May 7, 1806; Keith, *Const. Hist. First British Empire*, pp. 382, 383. The provisions of the 7 & 8 Will. III. c. 22, may also be noted, by which "all bye-laws, usages, and customs in practice in any of the possessions of the Crown repugnant to any law already made or to be made relating to the said possessions shall be utterly void and of none effect": see Duncan, *Hist. Guerns.*, p. 427.

(y) Three Orders in Council of February 11, 1852, were issued by the Crown to remedy some of the judicial abuses existing in Jersey. This course was objected to by the legislature of the island, which, however, passed local Acts in accordance to some extent with the provisions of the orders. The case was remitted by the Crown to a committee of the Privy Council, which expressed serious doubt as to the validity

of mercy independent of the States (z), and the lieutenant-governor may likewise deport aliens (a).

In both Jersey and Guernsey a lieutenant-governor (b) is appointed by and represents the Crown. He commands the military forces in the islands, under the control of the Army Council; his consent is necessary before the local legislatures or "States" can meet, and he may veto certain forms of legislation passed by the States (c) if he regards them as inimical to Crown interests. In either case, however, he must state his reasons for refusal to the Home Secretary. The legislative and judicial institutions of the two islands are similar; those of Jersey are as follows:—

### *Jersey.*

**Local Officers.**—Jersey is divided into twelve parishes, the head of which is the *constable*, or *connétable*, an officer elected by the people every three years. The duties of this officer correspond generally to those of an English mayor. He superintends the affairs of the parish, is the head of the police, and the president of the parish assembly; he also represents the parish at meetings of the legislative body or *States*.

**Courts and Laws.**—The Royal Court, the chief Court of the island, is presided over by the *bailiff*, an officer appointed by the Crown *durante bene placito*, and selected for his knowledge of the law. He acts as chief justice, and is assisted in civil suits on first instance and appeal by from two to seven of the twelve *jurats*, and in criminal suits by a jury of twenty-four. It has recently been decided that jurisdiction as to wills of immovables belongs to the ordinary Court, which sits weekly, and not to the ancient Cour d'Héritage, which sat twice a year (d).

In civil matters appeal lies to the Judicial Committee of the Privy Council. In criminal matters it does not lie as of right, as in the case of civil appeals, but can be brought by special leave (e). The law

of the orders, but did not definitely settle the point. An Order in Council of December 29, 1853, accordingly revoked the previous orders and sanctioned the Acts of the local legislature: see *The States of Jersey, In re*, 9 Moo. P. C. 185. The same question came again before a committee of the Privy Council in 1894, the States of Jersey having refused to register an Order in Council with reference to the Prison Board. The committee took the same course as in the previous case, not definitely deciding the point, but recommending the Crown to give way to the wishes of the States. For Guernsey, see *Guernsey States Petition, In re* (1861), 14 Moo. P. C. 363, which decided that an ancient office should not be abolished except with assent of the States, and for documents, 8 St. Tr. (N. S.) 285.

(z) *Daniel, In re*, Order in Council, January 12, 1891; *Guernsey (Bailiff, &c.), In re* (1844), 5 Moo. P. C. 49.

(a) *Guernsey (Bailiff, &c.), In re* (1844), 5 Moo. P. C. 49.

(b) Besides the lieutenant-governor, a governor used also to be appointed, but his duties being merely nominal, the office has not latterly been filled. The selection of the lieutenant-governor primarily rests with the Secretary of State for War, but the Home Secretary takes the formal steps to secure issue of his commission.

(c) Cf. *Jersey States Representation, In re* (1862), 15 Moo. P. C. 195: veto of legislation placing lunatics in private house instead of providing a public asylum, is proper as affecting a Crown interest under Order in Council, July 19, 1619.

(d) *Gilbert v. Ching*, [1936] A. C. 145.

(e) *Renouf v. Att.-Gen. for Jersey*, [1936] A. C. 445.

administered by the Royal Court is the common law of the whole of the islands founded upon the old *Coutume de Normandie*, upon which have been grafted many local usages and customs; ordinances passed by the Royal Court and Acts of the States; Acts of the Imperial Parliament and Orders in Council relating to the island, and registered in the Royal Court; and the regulations made from time to time by royal commissioners appointed under the Great Seal (*f*).

The King's writ does not run in the islands of Jersey and Guernsey (*g*) except the writs of *habeas corpus*, prohibition, *certiorari*, and *mandamus*, which do so run on a proper occasion (*h*), as also does the King's commission under the Great Seal. Ecclesiastical jurisdiction is exercised in the islands by the dean, who is appointed by the Crown. Appeal lies to the Bishop of Winchester, the islands being in his diocese (*i*).

**The Legislature.**—The local legislature, or *States*, is composed of the bailiff (who acts as president), the twelve constables, the twelve jurats (who are *ex officio* members), and the twelve rectors of the various parishes appointed by the Crown for life (one of whom is also the dean), together with seventeen deputies, six for St. Helier, and one for each of the other eleven parishes, elected for three years. The franchise, by a law of 1919, was for men at age twenty, women at age thirty, ratepayers, or occupiers of houses or land; women of thirty upwards were made eligible for seats by a law of 1924, and age twenty-one fixed for the franchise in 1930. Norman French is the official language, but English may be used in the legislature.

The attorney-general, the solicitor-general, and the vicomte or sheriff, may be present, but may not vote, though the two former may speak.

The bailiff has a casting vote, and may dissent from any measure, stating his reasons for so doing to the Home Secretary. His dissent so expressed acts as a suspension of the measure for the signification of His Majesty's pleasure thereon.

The consent of the lieutenant-governor is necessary before the States can meet, and he has the right of vetoing any measure on the score that it is contrary to the special interest of the Crown, but his reasons must be stated to the Home Secretary. In all cases permanent Acts of the States need the assent of the Crown, expressed by Order in Council. Provisional ordinances or bye-laws may, how-

(*f*) In 1771 some of the more important laws then in force were embodied in a code. Cf. on Jersey, *La Cloche v. La Cloche* (1870), L. R. 3 P. C. 125; *Dyson v. Godfray* (1884), 9 App. Cas. 726; *De Cartaret v. Baudains* (1886), 11 App. Cas. 214; *Falle v. Godfray* (1888), 14 App. Cas. 70.

(*g*) This privilege was affirmed by an Order in Council, 6 Eliz.: see Le Quesne, Const. Hist. of Jersey, pp. 180 ff.

(*h*) See Le Cras, Laws of Jersey, pp. 17 ff.; *Belson, In re* (1850), 7 Moo. P. C. 114.

(*i*) Order in Council, March 11, 1658. Measures of the National Assembly of the Church of England may be applied to the Islands, or either of them, by Order in Council, after the States have been consulted; initiative rests with the Bishop who must consult the Decanal Conference; Channel Islands (Church Legislation) Measure, 1931. Provision is made by the Channel Islands (Representation) Measure, 1931, for the representation of the islands in the House of Laity and the Diocesan Conference of Winchester.

ever, be made for three years without the assent of the Crown (*k*). Taxation, unless to meet emergency, needs the assent of the Crown in Council.

Formerly the Royal Court had also the power to make ordinances and bye-laws, but this was taken away in 1771, when the laws of the island were codified (*l*).

### *Guernsey.*

The institutions of Guernsey, which includes Herm and Jethou, are almost precisely similar to those of Jersey, the island possessing its Royal Court, or *Chef Plaids* (composed of the bailiff and twelve jurats), and its *States*, composed of the bailiff (as president), the jurats, and the rectors, constables (twenty, elected by the ratepayers for three years), and 180 douzeniers of the eight parishes. The States has two functions: as an elective body it selects the jurats; as a deliberative body it is reduced in size, the douzeniers, who are elected for six years by the ratepayers from ex-constables (with whom they make up parish councils), being represented by deputies, four from the town and eleven from the country parishes, while there are eighteen members directly elected. Two Crown officers can vote.

The chief difference between the institutions of the two islands is that the Royal Court of Guernsey has still the power of making ordinances (*m*), and of suggesting legislative measures to the States (*n*). All legislation by the States requires the assent of the Crown in Council, and any substantial change in taxation requires like assent.

ALDERNEY has its own institutions, similar to those of Jersey and Guernsey, but the States of Guernsey claim the right to legislate for Alderney, and appeal lies from the Court of Alderney to the Court of Guernsey, and thence to the Privy Council; the Court of Guernsey claims criminal jurisdiction in Alderney.

SARK.—Sark, which is still an ancient feudal fief, now in the hands of a Dame de Sark, is also subordinate to Guernsey, whose Court and States claim full authority over it (*o*). It has now a legislative body, the Chief Pleas, consisting of the lord or his representative, the Seneschal, whom he appoints and who is the sole judge, the holders of the ancient tenements, and twelve deputies directly elected. It can legislate for order and local affairs; the Seigneur's assent is required, but if refused the Chief Pleas can appeal to the Guernsey Court (*p*).

(*k*) Order in Council, March 28, 1771 (Code of Laws, Jersey, 1771, p. iii).

(*l*) Code of Laws, Jersey, 1771, p. iii. Cf. *Le Gros v. Le Breton* (1833), 2 Knapp. 181. The Court cannot order payment from Crown revenues of repairs to the court-house. *Att.-Gen. of Jersey v. Le Capelain* (1842), 4 Moo. P. C. 37.

(*m*) These require the consent of the Crown in Council if any change in the existing law is made. Cf. *Tupper v. St. Peter Port Hospital (Treasurer)* (1836), 3 Knapp. 406.

(*n*) See *Le Quesne*, Const. Hist. of Jersey, pp. 101 ff.

(*o*) Cf. *Martin v. McCulloch* (1837), 1 Moo. P. C. 308. The right to legislate (subject to appeal to the Privy Council) is expressly recognised in the Order in Council, 1922, Arts. 13 and 16, as regards the functions of the Seneschal's Court and the Chief Pleas.

(*p*) Order in Council, 1922 (June 20). This Order was issued after the most mature deliberation on the advice of the Committee of the Council for the Affairs of Guernsey and Jersey as the outcome of a petition to the Crown from the Seigneur, Seneschal and Provost, replacing Guernsey Ordinances of 1827 and 1832.

It can impose a direct tax and authorise expenditure for the purposes of the Douzaine, the poor authority; other taxation requires the assent of the Crown in Council and expenditure that of the lieutenant-governor. The Royal Court of Guernsey may annul (subject to appeal to the Privy Council) any ordinance as unreasonable or *ultra vires*, and in like mode appeal lies to the Court from the Seneschal's Court.

The Channel Islands, it will be seen, have essentially subordinate legislatures, which have no independent constituent power. Measures of that type may be framed by the legislatures, but owe validity to confirmation and enactment by Orders in Council. A special committee of the Privy Council is set up for the affairs of the islands in accordance with very ancient practice.

### *The Isle of Man.*

The sovereignty of the Isle of Man was for many centuries vested in grantees of the Crown by letters patent in return for homage and the presentation of two falcons at the coronation of successive sovereigns. The island enjoyed its own constitution and complete legislative independence (*q*), subject, however, to the right of Parliament to legislate and of the Crown in Council to hear and redress complaints (*r*), it being ruled impossible to admit without, or even perhaps with, express words the exclusion of appeal. The grantees of the royal dignity, though nominally kings of the island, did not assume that title, but styled themselves "Lords of Man and the Isles," and eventually the sovereignty was purchased from the Duke of Atholl, the then holder, by George III. in the year 1765, for £70,000, under statutory authority (*s*), the church patronage, most of the royal franchises, such as waifs, wrecks, mines, fairs, tolls, &c., together with the property in the soil, being reserved to the Duke of Atholl in return for the ancient honorary services. These were acquired by the Crown by purchase in 1829 (*t*).

The island still enjoys a semi-autonomous constitution, the supreme legislative authority being vested in the Crown, the governor, now represented by a lieutenant-governor, the council, and the House of Keys, which constitute the Parliament of the island, known as the *Tynwald Court*.

The members of the House of Keys, originally a judicial body, are twenty-four in number, and formerly held office for life (*u*). They are now elected for five years unless sooner dissolved by the Crown (*x*). The electorate comprises males and females, six months resident, and

(*q*) See the various letters patent recited in Isle of Man Purchase Act, 1765 (5 Geo. III. c. 26), commencing with that granted to Sir John de Stanley, 7 Hen. IV. Cf. *Sodor and Man (Bishop) v. Derby (Earl)* (1751), 2 Ves. Sen. 337. That it is not part of the United Kingdom is laid down by *Davison v. Farmer* (1851), 6 Exch. 242.

(*r*) *Christian v. Corren* (1716), 1 P. Wms. 329.

(*s*) 5 Geo. III. c. 26.

(*t*) 6 Geo. IV. c. 34. See also 45 Geo. III. c. 123.

(*u*) Johnson, *Jurisprudence of the Isle of Man*, p. 20. Of the twenty-four, sixteen are elected for the six sheadings, five for Douglas and one for each of other three towns.

(*x*) The change was effected in 1866, when wider powers in finance were conceded: House of Keys Election Act, 1866, as amended in 1919.

women are eligible for membership; the restrictions on women's capacity in general were swept away by the Sex Disqualification (Removal) Act, 1921.

The lieutenant-governor is appointed by the Crown, advised by the Home Secretary, and his council for legislative purposes was composed of the principal dignitaries in the island *virtute officii* (y). In 1919 the archdeacon, receiver-general, and vicar-general ceased to be members. It now includes two nominees of the governor, and four selected by the House of Keys for four years, with the bishop and two deemsters and attorney-general (z). A member of the council may be authorised to appear in the House of Keys to explain any government measure.

The keys are summoned by the governor, and since 1765 Acts of the Tynwald, duly signed by members, must be confirmed by His Majesty in Council, and before they receive the force of law they must be promulgated in summary form in the English and Manx languages on July 5 on the Tynwald Hill. A certificate is then signed by the governor and speaker of the House of Keys. Since 1917 an Act may take effect on notification to Tynwald and certification, before promulgation, if so provided.

Either House must be summoned by the lieutenant-governor at the request of a majority of its members, and the Tynwald Court at the request of a majority of both Houses. Since 1922 members of both Houses receive £50 a year.

Finance is only in limited measure under the control of the legislature, which levies a low income tax. Customs are controlled and collected by the Imperial Parliament and Government, but a preliminary power of legislation, subject to Parliamentary confirmation given annually, is allowed (a). The disposal of the surplus revenue, after meeting the cost of government services as determined by the executive and a contribution of £10,000 to Imperial funds, rests with the legislature (b), which in 1938 decided to give £100,000 as a contribution to re-armament by five instalments; £750,000 was given in 1921—27 as a war gift.

Higher jurisdiction is exercised by the High Court (c), which has common law and Chancery sides. Crimes are dealt with by the Court of Gaol Delivery, presided over by a single judge (d). Appeal lies to the Staff of Government in civil, to the Court of Criminal Appeal of three judges in criminal matters, and thence to the Privy Council.

(y) There was doubt as to the persons actually entitled formerly to sit on the council, but the bishop, the treasurer or receiver-general, the two deemsters, the water-bailiff, and the clerk of the rolls, would appear to have been included: Johnson, Jurisprudence of the Isle of Man, p. 22.

(z) Isle of Man Constitution (Amendment) Act, 1919.

(a) Isle of Man (Customs) Act, 1887 (50 & 51 Vict. c. 5), s. 2.

(b) Isle of Man Customs, Harbours, and Public Purposes Act, 1866 (29 & 30 Vict. c. 23). Borrowing for harbour improvements is provided for by 43 & 44 Vict. c. 8; 51 & 52 Vict. c. 39, s. 8; 60 & 61 Vict. c. 51, s. 10.

(c) Trial without jury is provided for in certain cases by the Judicature (Amendment) Act, 1922.

(d) Criminal Code (Amendment) Act, 1921.

The Judicature Amendment Act, 1918, provided for the reduction of the three Manx judges to two, and the appointment by the Crown of a member of the English bar to act only as a Judge of Appeal. Thus, in appeal the Judge of Appeal sits together with the Manx judge who did not sit below. The Manx law is distinctive, showing Norse traits, especially in land law.

The Bishop of Sodor and Man has a seat in the Council, but is not entitled to a seat in the House of Lords. The Church is regulated by the Church Act, 1880, and the Church Assembly Act, 1925.

The Home Secretary is the intermediary between the island and the Crown.

## CHAPTER II.

## THE DOMINIONS.

*Dominion Status.*

**The Development of Dominion Status.**—The grant of responsible government to Canada in 1841—47 was a practical attempt to solve the issues between an executive responsible only to the Crown advised by the British Ministry and elective legislatures in which a majority was normally hostile to the executive. Lord Durham, in his famous Report (1839), held that autonomy could be conceded in all matters save constitutional change; foreign relations; external trade, Imperial and foreign; defence; and control of land and immigration, all issues to be dealt with by the Imperial control (*a*). But there was no attempt made to exact these reservations. Responsible government therefore was developed freely by convention under which all control was virtually abandoned by the Imperial Government, first in internal affairs, but later even in external relations. The decisive impetus was given by the Dominions' participation in the war of 1914—18, which culminated in their admission to share in an Imperial War Cabinet (1917—19) and to separate representation at the Paris Peace Conference, with, finally, grant of separate membership in the League of Nations by the Covenant of the League, 1919.

**The Imperial Conference of 1926.**—The issue of recasting legal forms to accord with the new status was discussed in 1917, but postponed at the Imperial Conference of 1921. The creation of the Irish Free State, however, with the same status as Canada, revived the issue and the advent to power of a Nationalist Government in South Africa, claiming sovereign independence, in 1924, taken together with difficulties with Canada over the signature and ratification of the treaty of Lausanne (*b*) and the position of the Governor-General (*c*), led to the decision of the Imperial Conference in 1926 to declare that the United Kingdom and the Dominions were autonomous communities within the Empire, equal in status, in no way subordinate one to another.

The application of this doctrine in internal affairs was further discussed in 1929 by a conference of experts, and, in 1930 by the Imperial Conference, and was carried out in the Statute of Westminster, 1931. For external affairs no legislation was considered necessary,

(*a*) Keith, *Responsible Government in the Dominions*, 1928 (ed. 2), i, 13 ff.

(*b*) Keith, *Speeches and Documents on the British Dominions*, 1918—31, pp. 322 ff.

(*c*) *Ib.* pp. 149 ff.

but certain constitutional changes were adopted in certain Dominions, including from 1927 a marked development of separate diplomatic representation of the Dominions.

**External Relations.**—The Dominions, other than Newfoundland, which is not a member of the League, are virtually distinct kingdoms—a title asked for by Canada in 1866–67 (which might well be conferred in 1939 on the score of the first royal visit to the Dominion) united only by a common king and therefore allegiance. But on the strength of this bond of union it is held by the British Government, as opposed to that of the Irish Free State and the Union of South Africa, that inter-imperial relations are not really international, and that agreements between parts of the Commonwealth are not treaties requiring for validity registration under Art. 18 of the League Covenant; nor can their interpretation (as in the case of the abolition of the oath of allegiance (*d*) under the Irish Free State Treaty of 1921 and the Financial Agreement of 1926) be submitted to an international tribunal, as opposed to an inter-imperial body as suggested by the Imperial Conference of 1930. The Imperial Conference of 1926 agreed that treaties concluded under League auspices could not be held to bind parts of the Empire *inter se* without special arrangement. It is disputed if the parts of the Commonwealth can remain neutral in case of war declared by the King for the United Kingdom or any other part; but it was made clear in the Locarno Pact of 1925 that the Dominions had no active obligations to render aid in measures which might become obligatory to redeem British undertakings. The same doctrine was accepted as regards British obligations under the Treaty of Lausanne, 1923, regarding the regime of the Straits, and the Treaty of Montreux, 1936, restoring Turkish control of the Straits was accepted only by the Commonwealth of Australia. It must further be noted that there is no possibility in international law of the Union of South Africa having a right to be regarded as neutral by a belligerent, so long as the Union's obligations under an agreement of 1921 as to the land defence of the British naval base at Simonstown remains binding (*e*).

So strongly was this felt by Mr. De Valera as regards the obligation of the Irish Free State under the treaty of 1921 to afford facilities in peace by the occupation of naval bases and generally in war for coastal defence purposes that he exercised pressure to secure from Mr. Chamberlain the surrender of these rights by agreement of April 25, 1938, confirmed by the Eire (Confirmation of Agreement) Act, 1938 (1 & 2 Geo. VI. c. 25).

**Dominion Treaty Powers.**—Eire sends diplomats to France, Belgium, Spain, Germany, the United States, Italy and the Vatican; Canada to France, Belgium, Holland, the United States, and Japan; the

(*d*) Keith, *Speeches, &c.*, pp. 460 ff.

(*e*) Keith, *Letters on Current Imperial and International Problems, 1935–36*, pp. 63 ff. The Simonstown accord was solemnly re-affirmed by the Union Minister of Defence, April 2, 1937: Keith, *The King, the Constitution, the Empire, and Foreign Affairs, 1936–37*, pp. 83 ff.

Union to the United States, Germany, France, Portugal, Stockholm, Holland, Belgium, and Italy; in other cases they act through British diplomats, as in all cases do Australia, New Zealand, and Newfoundland (*f*). All parts of the Empire must inform the others of proposed negotiations, so as to allow of representations, but each has the final decision as to what treaties it will conclude. Treaties affecting more than one part must be signed by plenipotentiaries for each part affected, and be ratified distinctly for each, as in the case of the Paris Pact of 1928 for the renunciation of war, and the London Treaty for the Limitation of Naval Armament, 1930; neither the Union nor the Irish Free State accepted that of 1936. Nevertheless Britain can take decisions indirectly deciding issues for the Dominions, as in her action in September 29, 1938, regarding Czechoslovakia, her acknowledgment of the King of Italy as Emperor of Ethiopia, in which she was anticipated by Eire and followed by Canada, and her acceptance of the annexation of Austria by Germany, with the resulting application to Austria of German treaties. The formal intervention of the Crown in issue of full powers and instruments of ratification requiring the countersignature of a British Minister has been removed in the case of the Irish Free State since 1931 by the use of an Irish seal affixed by an Irish Minister, who advises the King directly without the intervention of the Foreign and Dominions offices; a like procedure was introduced in the Union of South Africa in 1933—34 (*g*). But the Dominions so far have refused to give preferential terms to foreign Powers as against the Commonwealth, and at Ottawa in 1932 they affirmed the principle that inter-imperial trade treaties giving preferences were not subject to the operation of the most-favoured-nation clauses of international treaties. Nor are their High Commissioners in the capitals treated as entitled to be regarded as foreign diplomats and immune from local jurisdiction. Britain, moreover, still stipulates advantages for all British subjects and all British shipping in treaties when this can be secured from foreign powers, as in the treaty with Siam of November 23, 1937.

**The Statute of Westminster, 1931.**—This measure removes or confers on the Dominions the power to remove all signs of legal inferiority save one. The Imperial Parliament is not in future to legislate for the Dominions save at the request and consent of the Dominion expressed in the Act (*h*). This is a limitation self-imposed and legally revocable, but not a negation of sovereign power (*i*). A

(*f*) Most of these foreign States reciprocate, if there is any business to do. Consular representation is carried out by the Union at Hamburg and Gothenburg and at Lourenço Marques, by Eire in the chief centres of importance in the United States. Canada, the Union, and Eire still have permanent representatives accredited to the League of Nations at Geneva. Union Ministers to European States regularly in passing through London kiss hands on appointment, thus gracefully indicating their royal connection. So also, of course, in the case of Canadian diplomats.

(*g*) It gave it legal force by the Status of the Union Act, 1934, and the Royal Executive Functions and Seals Act, 1934.

(*h*) 22 Geo. V. c. 4, s. 4.

(*i*) Keith, *Constitutional Law of the British Dominions*, pp. 64—67; this view is now confirmed by the Privy Council in *British Coal Corporation v. The King* [1935], A. C. 500, 520 *per curiam*.

further limitation lies in the fact that the Union of South Africa has provided that no Imperial Act shall have effect therein as part of its law, unless extended thereto by a Union Act (k). It refused, therefore, to request and consent to the enactment of the Imperial Act, His Majesty's Declaration of Abdication Act, 1936 (l). But the Dominions are given (1) power to make laws with extra-territorial validity (m) and (2) power to repeal or alter any Imperial Act, for the Colonial Laws Validity Act, 1865 (n), which invalidated any law repugnant to an Imperial Act applying to the Dominions, ceases to apply to them (o).

They are expressly freed from the former limits on their power as to merchant shipping (p), and Colonial Courts of Admiralty (q). On the other hand, the new powers include no authority to alter the federal constitutions of Canada (r) and Australia (s) or the New Zealand constitution (t). But the Act only applies to Australia, New Zealand, and Newfoundland in so far as it is adopted by their Parliaments, and it may be adopted in whole or part and the adoption rescinded in whole or part (u). In Acts passed after December 11, 1931, "colony" does not include a Dominion, State, or province (x). The Act makes no change in the position of the States of Australia, but frees the provinces of Canada from the restrictions of the Colonial Laws Validity Act, 1865 (y). The autonomy thus conferred is completed by the resolutions of the Imperial Conference of 1930 recognising that (1) Dominion Acts cannot constitutionally be disallowed by the Crown on the advice of British Ministers, nor (2) can assent be refused to reserved bills, nor (3) bills be reserved save on Dominion advice, and (4) that existing constitutional provisions for reservation and disallowance can be eliminated from constitutions, subject to safeguarding the position of holders of Dominion trustee stocks who have invested on the faith of Dominion recognition of the right of disallowance of Acts violating the terms of issue. The right of disallowance never existed in the Free State; that of reservation was abolished by the Constitution (Amendment No. 21) Act, 1933. Reservation and disallowance disappeared under the Status of the Union Act, 1934. The case of trustee stock legislation was disposed of by Union legislation accepting the obligation not to submit for the royal assent, except after agreement with the British Government, any legislation altering any provisions of the stock to the injury of stockholders, or involving a departure from the original contract in regard to the stock, as provided in the Colonial Stock Act, 1934, as

(k) Status of the Union Act, 1934, s. 2.

(l) Keith, Journ. Comp. Leg., xix, 105 ff.; The Dominions as Sovereign States, pp. 105 f.

(m) 22 Geo. V. c. 4, s. 3.

(n) See p. 540, *post*.

(o) 22 Geo. V. c. 4, s. 2. See *British Coal Corporation v. The King*, [1935] A. C. 500; *Moore v. At.-Gen. for Irish Free State*, [1935] A. C. 484.

(p) *Ib.* s. 5.

(q) *Ib.* s. 6.

(r) *Ib.* s. 7.

(s) *Ib.* ss. 8, 9.

(t) *Ib.* s. 8.

(u) 22 Geo. V. c. 4, s. 10. No action has yet been taken, save by Australia, and the bill for this purpose did not pass in 1938.

(y) *Ib.* s. 7 (2).

(x) *Ib.* s. 11.

an alternative to the rules laid down under the Colonial Stock Act, 1900 (z).

It was also agreed that the appointment of the governor-general should lie with the Dominion Government (a), and in principle that appeals to the Privy Council should be terminated if any Dominion desired (b). In executive, legislative, and judicial matters, accordingly, Imperial influence is potentially or actually extinguished.]

### *The General Structure of Dominion Governments.*

The Dominions enjoy full representative and responsible polities, modelled on the lines of the English Constitution itself, the governor (c) representing the Crown; the executive council, composed of the Ministry, enjoying the confidence of the representative chamber (d), corresponding to the English Cabinet; and the legislature corresponding to the Lords and Commons.

In Canada (e), New Zealand, and Newfoundland the upper legislative chamber is composed of members nominated by the governor, whilst the lower chamber is elected. In Canada the number of members is limited to ninety-six, and tenure for life; in New Zealand it is for seven years, and there and in Newfoundland, where membership is for life, there is no limit of number.

In the Union of South Africa the senate is composed partly of members (eight) chosen by the governor-general, and partly of elected members (thirty-two), the lower legislative chamber (or House of Assembly) being composed entirely of elected members.

In the Commonwealth of Australia the legislature consists of the governor-general and two elected legislative chambers.

Three of these, viz., Canada, Australia, and in a limited sense the Union of South Africa, are federations of several states, or provinces, each state or province enjoying a separate local government. These local governments are subordinate to the central federal government,

(z) The rules of the Treasury require that a colony shall provide funds to meet any judgment of a Court in the United Kingdom, which implies the right to bring a petition of right in England in such a case, and shall keep funds for that purpose available, as well as agree to the disallowance of any legislation of the type referred to above: Treasury Order, December 6, 1900; 63 & 64 Vict. c. 62; 24 & 25 Geo. V. c. 47.

(a) The power was used in 1930—31, and in 1936 by Australia and Canada; in 1932 the governor-general of the Free State was dismissed and a new appointment made. In 1937 a local nominee, then a minister of the Crown, was chosen in the Union. In 1938 the Duke of Kent was announced as governor-general of the Commonwealth from the end of 1939.

(b) The appeal was therefore abolished by Canada in criminal causes by the Criminal Code Amendment Act, 1933, and in the Irish Free State by Constitution (Amendment No. 22) Act, 1933. See cases at p. 496, note (o), *ante*.

(c) The term is used freely to cover governor-general, the style used in the federations, New Zealand and the Union. In the States and Newfoundland the style is governor, the provinces have lieutenant-governors in Canada, administrators in the Union. All statements regarding Newfoundland refer to the responsible government constitution, at present suspended.

(d) Canada's Executive Council is styled Privy Council, and in it, the Commonwealth, Victoria, Tasmania, and the Union, the council includes *pro forma* ex-ministers.

(e) In Canada, South Africa, the Commonwealth, up to 1936, the Irish Free State, and now in Eire the upper chamber is termed "the senate"; those of the other Parliaments "legislative councils."

and the local constitutions vary, except in South Africa, where they are all similar. They enjoy responsible government, save in South Africa, where there is a modified system.

In the Dominion of Canada:—Quebec has a legislative council of twenty-one members nominated by the lieutenant-governor for life, and an elected legislative assembly. Ontario, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Alberta, and Saskatchewan have now one chamber only. The Yukon is under a comptroller with an elected territorial council of three members. The North-West Territories is under a commissioner with a nominated council of six members, including the deputy commissioner.

In the Commonwealth of Australia:—New South Wales had a legislative council nominated by the governor, not limited in numbers, holding office for life, and an elected assembly, but in 1933, at a referendum, was approved a bill creating a council of sixty members elected by the two houses by proportional representation, holding office for twelve years, a fourth retiring every three years. The first house, constituted in 1934, had four groups of members elected for three, six, nine and twelve years respectively. Its constitution can only be altered, with approval at a referendum: the same rule has been adopted in Queensland against the re-creation of a legislative council. Victoria, South Australia, Tasmania, and Western Australia have elected legislative councils and assemblies. Queensland has since 1922 only a legislative assembly; the assemblies have a three years' duration, but five in South Australia and Tasmania; in the former return to three is proposed.

In the Union of South Africa all the provinces, viz.:—The Cape of Good Hope, Natal, the Transvaal, and the Orange Free State have a provincial council elected for three years, and an executive committee composed of the Administrator and four members elected by the provincial council by proportional representation.

**The Powers of Dominion Parliaments.**—These powers where the Statute of Westminster, 1931, is applicable or is adopted are absolute in character, save as regards the constitutional safeguards for the Canadian, Commonwealth, and New Zealand constitutions. Otherwise, the legislation is subject to the restriction that, save under express or implicit Imperial authority, as in the case of defence (*f*), or customs (*g*), it cannot have operation outside the territorial limits (*h*). Further, it is invalid in so far as it is repugnant to any Imperial legislation, *e.g.*, as to merchant shipping (*i*). In the case of federations, of course, legislation by federation or states or provinces which is outside the sphere of authority assigned is invalid, and that remains unaffected by the Statute of Westminster. It is doubtful if even now

(*f*) *Sickerdick v. Ashton* (1918), 25 Commonwealth L. R. 506; *Re Grey* (1918), 42 Dom. L. R. 1.

(*g*) *Croft v. Dunphy*, [1933] A. C. 156; *P. & O. Company v. Kingston*, [1903] A. C. 471.

(*h*) *Macleod v. Att.-Gen. for New South Wales*, [1891] A. C. 455 (bigamy); contrast, for expulsion of aliens, *Att.-Gen. for Canada v. Cain*, [1906] A. C. 542.

(*i*) *Union Steamship Co. of New Zealand v. The Commonwealth* (1925), 36 C. L. R. 130.

the legislation of any Dominion would be valid, if it negated allegiance to the Crown or severed the connection with the United Kingdom (*k*). But by the Royal Executive Functions and Seals Act, 1934, power is given (s. 6) to the Governor-General to exercise every royal power on the recommendation of the Governor-General in Council, *i.e.*, the Cabinet, and an Act abolishing the connection with the Crown might thus be signed. But if it would be legally effective is disputed. In the Irish Free State, by the Constitution (Amendment No. 27) Act, 1936, arising from Edward VIII.'s abdication, all internal authority of the King is eliminated from the constitution, a position repeated in the constitution of Eire, and the Irish view is that secession is legally within the power of the Dáil (*l*).

**The Privileges of Dominion Parliaments.**—With regard to the privileges of Parliaments, the *lex et consuetudo parliamenti* have been held to apply exclusively to the Lords and Commons, and not to overseas Parliaments; and therefore the legislative council of Tasmania had no power to commit for contempt (*m*). But in the case of Victoria, whose constitution depends on a colonial Act of 1854, ratified by Imperial Act (*n*), the colonial legislature was given power to define its own powers and immunities, which were not to exceed those enjoyed by the House of Commons in England. A Victorian Act (*o*) accordingly gave the legislative assembly the same powers and immunities as the House of Commons, and therefore the assembly was held to have power to commit for contempt (*p*). The same provisions have been made with regard to Canada (*g*) and Western Australia (*r*); the Commonwealth (*s*) and the Union have wider powers (*t*). Other legislatures (*u*) can take such powers as they like, but New South Wales has not done so (*x*), though it can suspend members under Standing Orders (*y*).

**The Executive Government.**—The power of the Crown is normally exercised by the governor on the advice of his Cabinet or a Minister. Up to 1926 it was usually admitted that he could refuse advice if he could secure a Ministry to accept responsibility for his refusal. But on this right being acted on by Lord Byng in Canada in 1926, Mr. Mackenzie King treated the issue as essential, and succeeded in

(*k*) Keith, *Constitutional Law of the British Dominions*, pp. 38—42; *The Dominions as Sovereign States*, pp. 324 f.

(*l*) Cf. Keith, *Journ. Comp. Leg.* xix, 106 ff.; *The Dominions as Sovereign States*, pp. 100—11, 606 f.

(*m*) *Fenton v. Hampton* (1858), 11 Moo. P. C. 347, following *Kielley v. Carson* (1842), 4 Moo. P. C. 63. Cf. *Barton v. Taylor* (1886), 11 App. Cas. 197.

(*n*) 18 & 19 Vict. c. 55.

(*o*) 20 Vict. No. 1.

(*p*) *Dill v. Murphy* (1864), 1 Moo. P. C. (N. S.) 487; *Speaker of Victorian Legislative Assembly v. Glass* (1871), L. R. 3 P. C. 560.

(*g*) 38 & 39 Vict. c. 38, s. 1.

(*r*) Western Australia Constitution Act (53 & 54 Vict. c. 26), s. 36.

(*s*) Commonwealth of Australia Constitution Act, 1900, Const. s. 49.

(*t*) South Africa Act, 1909, s. 57.

(*u*) *Fielding v. Thomas*, [1896] A. C. 600 (Nova Scotia).

(*x*) *Willis v. Perry* (1912), 13 Commonwealth L. R. 592.

(*y*) *Harnett v. Crick*, [1908] A. C. 470.

defeating Mr. Meighen's Ministry at the general election. The Imperial Conference of 1926 then asserted that the position of the governor-general was analogous to that of the King in the United Kingdom, and since then advice, *e.g.*, on a dissolution, has been regularly acted on. The decision of 1930 to place the appointment in the hands of the local government (which does not apply to the Australian States) practically eliminates the possibility of any useful control such as the Crown can still exercise in the United Kingdom (z). When appointment is independent of the local government, the Governor can still act, as when in 1932 the Governor of New South Wales dismissed Mr. Lang for his defiance of the laws of the Commonwealth, and the general election following homologated his action (a).

**The Cabinets.**—In Canada responsible government rests on convention, as in the United Kingdom, and this is also the case in New Zealand and Newfoundland. In the Commonwealth of Australia, Victoria, South Australia, and the Union the principle is enacted that Ministers must have or obtain in three months seats in Parliament, but the legal rule is unnecessary. Obedience to its principles is enforced if need be by difficulties as regards the budget. Thus in 1936 the proposal of the Commonwealth Prime Minister to dissolve Parliament early in 1937 had to be dropped as a section of his followers threatened to refuse to vote supplies, and the Premier of Alberta, Mr. Aberhart, was compelled by revolt of his followers on the budget to bring forward his long delayed projects for introducing social credit.

### *The Dominion of Canada.*

The Dominion of Canada was discovered by Sebastian Cabot in 1497. Early in the sixteenth century (1525) the French took possession of the country and settled on the St. Lawrence. In 1759 General Wolfe defeated the French at the battle of Quebec, and the country was formerly ceded to Great Britain by the Treaty of Paris, 1763. The constitution of the Dominion of Canada depends principally upon the British North America Act of 1867 (b), which empowered Her Majesty to declare the united province of Canada (re-divided into the provinces of Ontario and Quebec), Nova Scotia, and New Brunswick one dominion under the name of Canada and provided for the constitution, and for the admission of other colonies at their request; British Columbia joined in 1871, Prince Edward Island in 1873. This Act was brought into force by proclamation of May 22, 1867. By the British North America Acts of 1871 and 1886 (c) the Dominion Parliament was empowered to erect and provide for the constitution of new provinces, and also to provide for the representation of such provinces, or of any territories forming part of the

(z) Keith, *Letters on Current Imperial and International Problems*, 1935—36, pp. 81, 82.

(a) *Ib.* p. 85; *The Dominions as Sovereign States*, pp. 227 f., 230 f.

(b) 30 & 31 Vict. c. 3.

(c) 34 Vict. c. 28; 49 & 50 Vict. c. 35; these with the Acts of 1867 and 1915, 1916 and 1930, may be cited as the British North America Acts, 1867 to 1930 (20 & 21 Geo. V. c. 26, s. 3).

Dominion but not included in any province, in the Senate and House of Commons. Canada now consists of nine provinces (Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Saskatchewan, and Alberta), and the North-West Territories and the Yukon, all of which save the North-West Territories are represented in the House of Commons (*d*).

The executive power of the Dominion government is vested in the Crown and exercised by a governor-general appointed by the Crown on the advice of the Dominion government. He acts on the advice of a Cabinet composed of such members of the Privy Council as are the heads of the principal government departments and enjoy the confidence of the Canadian House of Commons. Legislative power is vested in the Crown, whose assent is given by the governor-general, and a Parliament consisting of the Senate (*e*) of ninety-six members (Ontario, twenty-four; Quebec, twenty-four; Nova Scotia, ten; New Brunswick, ten; Prince Edward Island, four; British Columbia, Manitoba, Saskatchewan, and Alberta, six each) nominated by the governor-general for life, and a House of Commons composed of members elected by ballot in proportionate numbers for each province according to the population. The representation is readjusted on the taking of the census every ten years, and is arranged in proportion to the new population, but so that Quebec always remains represented by the fixed number of sixty-five members in the House of Commons (*f*). The House of Commons sits for five years unless sooner dissolved, and the franchise is regulated by federal Act on adult suffrage. The Lower House has sole financial initiative, but the Senate cannot be swamped, and can reject or even amend a money bill, though that is always resented. The Parliament has no power to alter the fundamental clauses of the constitution, and all change is carried out, on addresses by the two Houses of the Dominion Parliament, which are passed with general assent, by the Imperial Parliament (*g*).

(*d*) The various British possessions in North America (except Newfoundland) have been annexed to the Dominion by various Orders in Council: Rupertsland (out of which the Province of Manitoba was created by the Canadian Act, 33 Vict. c. 3) in 1870, British Columbia in 1871, Prince Edward Island in 1873, and all other British possessions not previously annexed, and which are now included in the North-West Territories and the Yukon in 1880; see Orders in Council, June 23, 1870; May 16, 1871; June 26, 1873; July 31, 1880; December 18, 1897. British Columbia and Prince Edward Island had already enacted for themselves their own form of government on joining the Dominion; that for the North-West Territories was provided by the 38 Vict. c. 49 (Canadian); the Yukon was made a separate territory by a Canadian Act of 1898 (61 Vict. c. 6). Saskatchewan and Alberta were created out of the North-West Territories by Canadian Acts of 1905.

(*e*) Act of 1915 (5 & 6 Geo. V. c. 45), amending Act of 1867, s. 22. To break a deadlock four or eight members, divided equally between the four divisions of Canada, may be added by the Crown.

(*f*) Act of 1867, ss. 51, 52. The total is 245: Ontario, eighty-two; Quebec, sixty-five; Nova Scotia, twelve; New Brunswick, ten; Manitoba, seventeen; British Columbia, sixteen; Prince Edward Island, four; Saskatchewan, twenty-one; Alberta, seventeen; Yukon, one; French is official as well as English.

(*g*) When provincial rights are affected, unanimous assent has been obtained from the governments, as in 1907 in regard to the provincial subsidies (7 Edw. VII. c. 11), and in 1931 as regards the Statute of Westminster, 1931. That this is necessary is disputed, but all efforts—repeatedly made since 1931—so far to secure agreement in Canada as to the mode of local amendment with the assent of all, or in minor cases of the majority of the provinces have been unsuccessful.

Each province enjoys a responsible government, the executive being vested in a lieutenant-governor appointed by the governor-general in council and an executive council appointed by the lieutenant-governor, whilst the legislature is composed of the lieutenant-governor and an elected legislative assembly; Quebec having also a nominated legislative council; in it French is an official language.

The provincial legislature have the power of altering their own constitutions except with regard to the lieutenant-governors (*h*), and can establish the system of referendum and initiative as in Alberta (*i*), and even the system of recall of members if their constituents dislike their activities (*k*).

**Legislative Powers.**—The Dominion legislature has power to legislate on all matters not coming within the classes of subjects exclusively assigned to the provincial legislatures (the converse is the case in the United States), whilst at the same time certain classes of subjects are exclusively assigned to the Dominion legislature (*l*). The list of provincial subjects include property and civil rights, local and private matters, direct taxation, municipal institutions, shop and other licences, the administration of justice and organisation of Courts, but not criminal procedure, local works, and communications as opposed to those extending beyond the limits of a province, prisons, hospitals, asylums, &c. (*m*). They control also education, with safeguards for minority rights, subject to the possibility of federal remedial legislation (*n*). It is now decided that the Federal Parliament has paramount power to legislate on any topic, such as air navigation (*o*), or radio-telegraphy (*p*), affecting the whole Dominion, on which the Dominion makes a treaty with foreign powers, provided always that the subject-matter is not exclusively assigned to a province, in which case the province must legislate if Canada is to accept a treaty obligation (*q*). Nor is it a valid ground to legislate that the matter affects Canada generally, if the issue is within provincial power; a Natural Products Marketing Act is *ultra vires* (*r*). Nor can the powers to tax and to spend be pressed to allow of an Employment and Social Insurance Act (*s*). These measures were part of the attempt of Mr. Bennett's government in 1934—35 to apply the principles of the "New Deal" in the United States to Canada, and their invalidity raises grave issues. In addition to direct taxation the provinces receive subsidies based on population

(*h*) 30 & 31 Vict. c. 3, s. 92 (1).

(*i*) *R. v. Nat Bell Liquors, Ltd.*, [1922] 2 A. C. 128.

(*k*) The Legislative Assembly (Recall) Act, 1936; Keith, Journ. Comp. Leg. xix, 111 ff. Now repealed.

(*l*) Act of 1867, s. 91.

(*m*) *Ib.* s. 92.

(*n*) *Ib.* s. 95.

(*o*) *Regulation and Control of Aeronautics in Canada, In re*, [1932] A. C. 54. This was covered by s. 132 of the Act, as the treaty was imperial.

(*p*) *Radio Communication in Canada, In re*, [1932] A. C. 304.

(*q*) *Att.-Gen. for Canada v. Att.-Gen. for Ontario*, [1937] A. C. 326; Weekly Rest in Industrial Undertakings Act, 1935; Minimum Wages Act, 1935; Limitation of Hours of Work Act, 1935, all invalid. The treaties relied on were not imperial, but acceptances of Labour Organisation Conferences which the Dominion ratified—it now appears improperly.

(*r*) *Att.-Gen. for British Columbia v. Att.-Gen. for Canada*, [1937] A. C. 377.

(*s*) *Att.-Gen. for Canada v. Att.-Gen. for Ontario*, [1937] A. C. 355.

from the Dominion, readjusted in 1907 and later, while the federation has found large sums for various forms of relief of unemployment, old age pensions, &c.

With regard to immigration and agriculture both the Dominion and provincial legislatures have a concurrent power of legislation, subject to this, that provincial Acts are void so far as they are repugnant to Dominion Acts (*t*).

**Judicature.**—Cases of conflict between the Dominion and provincial legislatures are settled by the Supreme Court of Canada, and on appeal by the Privy Council. The Dominion judicature consists of the Supreme Court of Canada (*u*), and the Exchequer Court of Canada, which is also a colonial Court of Admiralty. It has jurisdiction as regards copyright, patents, and petitions of right against the Dominion, and is subject to appeal to the Supreme Court (*x*).

In the provinces there are superior, district and County Courts, and from the Court of final resort in each (Supreme Court or Court of Appeal), appeal in civil and criminal cases lies to the Supreme Court of Canada, and there is also a concurrent right of appeal to the Privy Council without going through the Supreme Court (*y*), save in criminal causes in a wide sense of that term, appeals being shut off by the Criminal Code Amendment Act, 1933 (*z*). But, if the appeal is taken to the Supreme Court, the decision is final, saving, however, any right of appeal which His Majesty may be pleased to exercise by virtue of his royal prerogative (*a*). The abolition of the appeal was proposed by Mr. Cahan for the Conservatives on February 10, 1938, and supported by Mr. Lapointe, Minister of Justice, but his assertion that the federation has the legal power to destroy appeal to the Privy Council by its own action is of dubious validity.

The judges of the Supreme Court are appointed by letters patent under the Great Seal of Canada (*b*).

### *The Commonwealth of Australia.*

The Australian Commonwealth (proclaimed by letters patent of September 17, 1900) is a federation from January 1, 1901, of six states, namely, New South Wales, Queensland, Victoria, South Australia, Tasmania, and Western Australia. There are also the federal territories, the Northern Territory, the federal capital territory, the dependencies of Papua and Norfolk Island; and the mandated territory of New Guinea; Nauru under mandate to the Empire is under Australian administration. By Order in Council of February 7, 1933, the Australian Antarctic Territory (all land south of 60° south

(*t*) Act of 1867, s. 93.

(*u*) Established in 1875 by 38 Vict. c. 11 (Canadian Act).

(*x*) Exchequer Court Act (R. S. C., 1927, c. 34).

(*y*) See Wheeler, *Confederation Law of Canada*, p. 396.

(*z*) See *British Coal Corporation v. The King*, [1935] A. C. 500.

(*a*) 38 Vict. c. 11, s. 47 (Canadian Act), and see Supreme Court Act (R. S. C., 1927, c. 35), s. 54.

(*b*) 38 Vict. c. 11, s. 4 (Canadian Act). See now Supreme Court Act (R. S. C., 1927, c. 35); Judges Act (*ib.* c. 105).

lat., between 160° east long. and 45° east long.) was placed under the Commonwealth and accepted by Act of June 13, 1933, which became effective from August 24, 1936; Adélie Land is excluded as French. The federal constitution is regulated by the Commonwealth of Australia Constitution Act, 1900 (*c*).

Under this Act the executive is vested in a governor-general appointed by and representing the Crown, now advised by the Commonwealth Government, and a federal executive council, composed of members chosen by the governor-general (*d*), who are Ministers of State, now number eleven, with additional honorary Ministers, and act as the heads of such of the government departments as the Federal Parliament or, in default of that body, as the governor-general directs (*e*).

The legislature is composed of the King (represented by the governor-general) (*f*), an elected Senate of thirty-six, equally representing the States, which form the electorates, and an elected House of Representatives; the members of the House, elected by universal suffrage for three years, are returned by the various states in proportion to their population (*g*). Senators are elected for six years, half their number retiring in rotation at the end of three years (*h*). The Senate may not originate nor amend money bills, but may suggest amendments. Otherwise it has equal power, though on customs tariff issues its control used regularly to be evaded by postponing submission of the tariff to the Senate, while collection proceeded under the lower House's resolutions; a time limit is now set, and tacking is prohibited. Deadlocks can be broken by a double dissolution after two rejections; thereafter on disagreement the bill is to be decided on by a joint sitting by an absolute majority (*i*).

**Legislative Powers.**—The Parliament of the Commonwealth is given certain (*k*) virtually exclusive powers of legislation, and it may also legislate on a certain number of matters expressly specified by the Act (*l*), including trade (other than intra-state), taxation, bounties, borrowing, postal services, census and statistics, currency, banking, insurance, insolvency, certain corporations, marriage and divorce, invalid and old age pensions, immigration and emigration, external affairs, relations with the islands of the Pacific, and conciliation and arbitration for the settlement of industrial disputes extending beyond the limits of one state. It has been claimed, but is doubted, that the power as to external affairs extends to allow the Commonwealth to usurp powers not accorded otherwise to it by concluding a treaty

(*c*) 63 & 64 Vict. c. 12. Power is reserved to the Federal Parliament by the Act to admit new states.

(*d*) *Ib.* Const. s. 62.

(*e*) S. 65.

(*f*) S. 1.

(*g*) S. 24; New South Wales, twenty-eight; Victoria, twenty; Queensland, ten; South Australia, six; Western Australia, five; Tasmania, five; and one for the Northern Territories, without voting power.

(*h*) Ss. 7, 13.

(*i*) Ss. 54—57. No such case has yet occurred.

(*k*) Customs and excise, defence, posts and telegraphic, quarantine, lighthouses, &c.; the seat of government (Canberra).

(*l*) Ss. 51, 52.

regarding the matter, *e.g.*, as regards air navigation within a State. At present the High Court seems to hold that this is possible, but only if the legislation adheres rigidly to the terms of the convention (*m*). Naturalization is within its sphere as well as patents, copyright, trade-marks, &c. The State Parliaments may legislate on any subject not exclusively assigned to the Commonwealth Parliament, but in case of inconsistency the law of the Commonwealth is to prevail (*n*). The constitutions and laws in force in each colony are preserved by the Act (*o*), and the governors are appointed as before, by the Crown, and not by the governor-general.

The Commonwealth has sole power to impose customs and excise, otherwise it competes with the States, both imposing land, income, and estate and succession duties. Under a financial agreement of 1927, which is made part (s. 105A) of the constitution by the Constitution Alteration (State Debts), 1928, the Commonwealth pays in all about £8,500,000 in respect of State debts, and contributes to sinking funds in respect of the debts, past and future. The issue of Commonwealth and State loans is controlled by the Loan Council, representing the governments. The Commonwealth has power to impound State taxes if they default in payment of the interest on their debts under the agreement, and successfully did so in 1932 (*p*).

**Judicature.**—The judicial power of the Commonwealth is vested in a High Court of Australia (*q*), which has jurisdiction to hear appeals from the High Court itself when exercising its *original* jurisdiction, from the Supreme Court of any state, and from the Inter-State Commission (*r*) constituted by the Act to execute and maintain the provisions of the Act relating to trade and commerce (*s*); the decision of the High Court in such appeals is final, with a saving, however, of His Majesty's prerogative right to grant special leave to appeal to the Privy Council (*t*), except in cases of disputes as to the constitutional powers of the states *inter se* or of a state and the Commonwealth, where a certificate from the High Court that the question is a proper one for appeal is required (*u*). The right of appeal from state Courts to the Privy Council has been taken away by the Australian Commonwealth Judiciary Act, 1907 (No. 8), so far as such disputes are concerned (*x*). Hence, as the High Court refuses a certificate on

(*m*) *R. v. Burgess; Henry, Ex parte* (1936), 55 Commonwealth L. R. 608; Keith, Journ. Comp. Leg. xix, 113 ff. For broadcasting power is admitted: *The King v. Brisan; Williams, Ex parte* (1935), 54 Commonwealth L. R. 262.

(*n*) S. 109.

(*p*) *New South Wales v. Commonwealth* (No. 1) (1932), 46 Commonwealth L. R. 155; (No. 3) *ib.* 246.

(*o*) Ss. 106, 108.

(*q*) S. 71.

(*r*) S. 73. It is proposed to revive this body, which was not re-appointed after 1920, since it was ruled that it had no judicial powers, as the members had not the necessary judicial qualification of life tenure.

(*s*) S. 101.

(*t*) See *post*, p. 548, as to the Crown's right to grant special leave to appeal in such cases.

(*u*) S. 74. The Privy Council decides if the case falls within the section: *James v. Cowan*, [1932] A. C. 542; *Minister for Trading Concerns, W. Australia v. Amalgamated Society of Engineers*, [1930] A. C. 170.

(*x*) *Webb v. Outrim*, [1907] A. C. 81, negatived the view (*Colonial Sugar Co. v. Irving*, [1905] A. C. 369) that the Judiciary Act, 1903, had this effect: hence the Act of 1907 was passed under the power to define how far federal jurisdiction could be exercised by a state Court.

principle, it has been able to retain in its own hands the interpretation of the constitution. Up to 1920 it applied the American doctrines of (1) the immunity of federal and state instrumentalities and (2) the reserved powers of the states, and so asserted state sovereignty. It has now adopted the rule of the Privy Council (*y*) and interprets the constitution on the ordinary lines of British Acts (*z*). Acting on this basis the Privy Council has ruled that the Commonwealth, no less than the states, is bound by the rule of freedom of inter-state trade, thus invalidating all schemes for control of trade in agricultural products (*a*), and the attempt by referendum on March 6, 1937, to obtain this power for the Commonwealth was decisively defeated, and less decisively one to confer full power as to aviation; in the former case all six states rejected the proposal, probably owing to dislike of governmental interference in business, in the latter Victoria and Queensland favoured federal control.

The High Court has also certain original jurisdiction conferred upon it by the Act and by the Parliament (*b*).

**Alteration of the Constitution.**—The constitution can only be altered by an Act passed by an absolute majority in both Houses, or, in case one House refuses to pass it, by an Act passed by an absolute majority in either House for the second time after an interval of three months. In both cases the Act must be referred to the electors in each state, and if approved by a majority of all the electors, and by the majority of the electors in a majority of the states, it may be presented for the Crown's assent (*c*). No alteration diminishing the proportionate or minimum representation of, or affecting the provisions of the constitution with regard to, any state, can become law unless approved by a majority of the electors in that state (*d*). It is thus practically impossible by this means to secure unification as desired by the Labour government in 1930 (*e*), or, on the other hand, for a state such as Western Australia in 1933 to secure the power to secede (*f*).

Under the Australian States Constitution Act, 1907 (*g*), bills passed by the state legislatures must be reserved for His Majesty's pleasure,

(*y*) *Webb v. Outtrim*, [1907] A. C. 81.

(*z*) *Amalgamated Society of Engineers v. Adelaide Steamship Co.* (1920), 28 Commonwealth L. R. 129, overruling *The Railway Servants' Case* (1906), 4 Commonwealth L. R. 488; *New South Wales v. Commonwealth* (1932), 46 C. L. R. 155.

(*a*) *James v. The Commonwealth*, [1936] A. C. 578. See Keith, *Journ. Comp. Leg.* xviii, 281 ff.; xix, 115.

(*b*) Ss. 75, 76. This includes cases between the states, or the Commonwealth and a state, claims by or against the Commonwealth (*Heimann v. Commonwealth* (1935), 54 C. L. R. 126), arising out of treaties or involving consuls, or in which *mandamus* or prohibition is sought against an officer of the Commonwealth. Admiralty jurisdiction has been conferred: *John Sharp & Sons v. The Katherine Mackall* (1924), 34 C. L. R. 420, with the result that the validity of the Admiralty jurisdiction of the state Supreme Courts is doubtful: cf. *McArthur v. Williams* (1936), 55 C. L. R. 324, 359, 360, Keith, *The Dominions as Sovereign States*, p. 449. (c) S. 128.

(*d*) The preamble to the Constitution Act of 1900 contemplates an indissoluble federal Commonwealth.

(*e*) Cf. Keith, *Letters on Current Imperial and International Problems*, 1935—36, pp. 26—29.

(*f*) *Ib.*

(*g*) 7 Edw. VII. c. 7. See *Burt v. The Crown*, [1935] W. A. L. R. 68, on the right of the governor to assent in case of urgency.

which (1) alter the constitution of the state legislature, or either House of the state legislature; (2) affect the salary of the governor; or (3) are required to be so reserved by Act of the state legislature, or by the bill itself. In New South Wales the position of the legislative council has been safeguarded by Acts of 1928—30 requiring that any change in its constitution or its abolition must be sanctioned by referendum (*h*), and in Queensland re-creation of a council and extension of the life of Parliament are similarly provided against (1933).

**Defence.**—The Commonwealth provides and maintains an Australian navy, including four cruisers, and military training was formerly compulsory on all male citizens between the ages of twelve and twenty-six, but compulsion is not at present enforced. Since the events of 1938 the navy and air force have been augmented, and efforts are being made to raise voluntarily 70,000 men for the non-permanent military forces. Canadian forces are comparatively small, the naval force consisting of six destroyers; the air force is used for civil purposes of observation, and the militia of the non-permanent force numbers 86,490.

**Differences between the Canadian and Australian Constitutions.**—The chief features in which the Canadian and Australian constitutions differ are:—

- (1) In Canada the federal senators are chosen by the governor-general, *i.e.*, the Cabinet, acting on purely political grounds, for life, in Australia they are elected by the various states and sit for six years, each state being equally represented, while in Canada there is inequality of representation, the Dominion being treated as consisting of Ontario, Quebec, the Maritimes, and the Western Provinces, each group having twenty-four senators.
- (2) Canadian lieutenant-governors are appointed by the governor-general in council. In Australia the state governors are appointed by the Crown. In modern practice, however, the lieutenant-governors, like the governors, act simply as constitutional rulers, and not as agents of the Canadian government. Their use, however, in the latter capacity has been revised in the case of Alberta since 1937, in so far as reservation of bills is concerned, and the right to disallow was recognised as existing by the Supreme Court in 1938 (*i*).
- (3) The Canadian Parliament can legislate on all matters not exclusively assigned to the provincial legislatures. In Australia the powers of the federal legislature are strictly defined, whilst the state Parliaments can legislate on any subjects not exclusively assigned to the Federal Parliament.

(*h*) *Att.-Gen. for New South Wales v. Trethowan*, [1932] A. C. 526. See Acts No. 28 of 1928; No. 3 of 1930; *Doyle v. Att.-Gen. for New South Wales*, [1934] A. C. 511.

(*i*) [1938] S. C. R. 71, which also recognises the right to require the lieutenant-governor to reserve bills. A full account of reservation is given by E. Forsey, *Canadian Journal of Economics and Political Science*, iv., 47—59.

In practice the difference is less in fact than in form, and it is an exaggeration on this ground to deny federal character to the Canadian constitution (*k*). It is, however, true that the mode of allocating powers differed, the federation in Australia being superimposed on the existing colonies, while in the case of Canada the Imperial Parliament took all powers into its hands and then allotted them to federation and provinces.

- (4) The Canadian House of Commons is elected for five years unless sooner dissolved, the Australian House of Representatives for three years.
- (5) There are no provisions in the British North America Act enabling the Federal Parliament to alter the fundamentals of the constitution, which can only be done by Imperial statute. The Australian Parliament can alter the constitution—at least within a federal framework—in the manner previously noticed as laid down in the Commonwealth of Australia Act.
- (6) The enactments of Canadian provincial legislatures are subject to disallowance by the governor-general in council. Enactments of state legislatures in Australia are subject to the veto of the Crown, but not to that of the governor-general. This distinction lost importance with the steady growth of a convention under which the Canadian government did not disallow acts on grounds of dubious constitutional validity, which it left to the Courts, and had practically given up disallowance on the score of injustice, the latest case being that of the Mineral Taxation Act of Alberta in 1924. But the efforts of Alberta to set up a social credit régime, after the accession of Mr. Aberhart to power in 1935, led to the revival of disallowance and its equivalent, requiring reservation of bills and then withholding assent, and this was ruled to be valid by the Supreme Court in 1938, when it also ruled invalid bills duly reserved, viz., the Bank Taxation Act, the Credit of Alberta Regulation Act, and the Accurate News and Information Act, as illegitimate efforts to invade the federal sphere of banking and control of credit, and to interfere with freedom of criticism (*l*), yet severe repression of opinion in Quebec by the Communist Propaganda Act, 1937, was not met by disallowance.

The greater federal powers in Canada are due to the circumstances of the formation of the Dominion. Federation was due (1) to deadlock in the united province of Canada between its French and English

(*k*) *Att.-Gen. for Australia v. Colonial Sugar Refining Co.*, [1914] A. C. 237, 252, 253, *per* Lord Haldane.

(*l*) *Reference re Alberta Bills*, [1938] S. C. R. 100. The Privy Council upheld the invalidation of the Bank Taxation Act as clearly not legitimate taxation, but could not pass judgment on the other two as they were rendered ineffective by the repeal of the Social Credit Act and its machinery; [1939] A. C. 117. The federal government did not disallow the Ontario legislation of 1935 and 1937 affecting contracts between the Hydro-Electric Commission and Quebec power companies.

inhabitants; (2) to fear of hostility from the United States and the need of military security; (3) to the desire to secure the position of the railway system by expansion to the maritime provinces and to the west; (4) to the wish to secure the Hudson's Bay territory and the north-west for the Dominion against the United States; and (5) to the necessity of making up for the loss of reciprocity (1866) with the United States by promoting inter-provincial freedom of trade. The framers of the constitution were therefore anxious for as much unity as was compatible with permitting Quebec its necessary autonomy, racial, religious, and linguistic as well as in law. In Australia federation was the slow outcome of consideration of (1) trade exchange; (2) the advantage of uniformity of laws of commerce; (3) the risk of the development of foreign interests in the Pacific, suggested by the presence of France in the New Hebrides and New Caledonia, and of Germany in Samoa and New Guinea, and by the rise to power of Japan after war with China (1894); (4) the need for an effective unity in defence preparations by land and sea; and (5) the desirability to prevent the influx of criminals and Chinese and Japanese by a common immigration restriction policy. Local autonomy was reluctantly surrendered and in as limited a degree as possible. While in Canada the United States constitution, though taken as a model, was regarded as opening the way to secession, as seen in the Civil War, and a closer union was aimed at, in Australia that constitution was much admired as meeting the needs of local autonomy with joint action in essentials.

The Canadian constitution was settled in London on the base of resolutions adopted by colonial delegates at Quebec in 1864, and later approved by Parliament in Canada alone. That of the Commonwealth was framed in Australia by conventions in 1891 and in 1897—98, and finally accepted by referenda in all the colonies in 1899. It was formally enacted by the Imperial Parliament with minimal change.

### *The Union of South Africa.*

**The Former Transvaal and Orange River Colonies.**—The various steps relating to the annexation of conquered colonies and the subsequent settlement of the government may be illustrated by a short account of the former Transvaal and Orange River Colonies. A commission under the royal sign manual and signet empowered Field-Marshal Lord Roberts to annex the Transvaal, constitute himself administrator, and make laws. This was accordingly done by Lord Roberts' proclamation of September 1, 1900 (*m*).

Letters patent under the Great Seal of August 2, 1901, constituted the office of governor, and created executive and legislative councils. These letters patent were subsequently revoked, and a similar form of government provided for the colony by letters patent of September 23, 1902 (*n*). Under these, the government of the Transvaal consisted of a governor and commander-in-chief, and a

(*m*) S. R. & O., 1900, p. 540.

(*n*) S. R. & O., 1902, p. 614. These letters patent were proclaimed in the colony, September 29, 1902.

lieutenant-governor, who exercised the powers conferred upon them by the letters patent or their commissions, or by instructions under the royal sign manual and signet, or conveyed through the Secretary of State; an executive council, composed of members appointed by instructions under the royal sign manual and signet, or conveyed through a principal Secretary of State; and a legislative council, consisting of the lieutenant-governor and members appointed by the Crown in the same manner as members of the executive council. The legislative council was empowered to legislate by ordinance, subject to disallowance by His Majesty, and to constitute Courts and officers, and make regulations for the proceedings therein. The lieutenant-governor, with the consent of the governor, appointed judges and other officers. Power was reserved to His Majesty to legislate for the colony by Order in Council. Appeal lay from the Supreme Court of the Transvaal to the Privy Council.

The successive steps in the formation of the government of the Orange River Colony were similar to those taken in the case of the Transvaal, and until the Union of South Africa under the South Africa Act, 1909, the former possessed a form of government similar to that of the latter.

Responsible governments were subsequently granted to both colonies by letters patent in 1906 and 1907 respectively (*o*), the legislatures being composed of a legislative council nominated by the governor, and an elected legislative assembly in both colonies. This step led shortly to a constitutional convention in 1908—09 which determined on union between the colonies and the Cape and Natal. The domination causes were the issues of tariff and railway rates, on which agreement as between the conflicting interests of the colonies was impossible; native affairs in view of the rebellion in 1906—08 in Natal due to gross misrule; defence in connection therewith; and uniformity of law especially in matters of commerce.

**The Constitution of the Union of South Africa.**—The South Africa Act, 1909 (*p*), constituted the colonies provinces of the Union under the names of the Cape of Good Hope, Natal, Transvaal, and Orange Free State respectively.

Power was reserved to the Crown by the Act to admit into the Union by Order in Council on an address by both Houses of the Union Parliament territories administered by the British South Africa Company, and to transfer to the Union on similar addresses the government of any territories inhabited wholly or in part by natives belonging to or under the protection of the Crown. But Southern Rhodesia in 1922 by referendum chose instead separate existence with responsible government, and the native territories are still strongly opposed to incorporation in the Union on the score of their objections to Union policy in native affairs, under which the interests of natives are definitely ranked as subservient to European needs (*q*).

(*o*) See the letters patent of December 6, 1906, and June 5, 1907, respectively; Parl. Pap., Cd. 2823, 3250 (1906).

(*p*) 9 Edw. VII. c. 9.

(*q*) Keith, *The King, the Constitution, the Empire, and Foreign Affairs*, 1936—37, pp. 79 ff., 85 ff.

The executive government is vested under the Act in the King or a governor-general appointed by the Crown, assisted by an executive council chosen and summoned by the governor-general and holding office during his pleasure. Not more than eleven ministers of state, who must be or become members of either of the legislative Houses, are also appointed by the governor-general to administer the departments of State.

The legislative power is vested by the Act in a Senate and a House of Assembly. The Union Parliament has now power to provide for the constitution of the Senate; until provision is so made, eight senators are nominated by the governor-general, and eight senators are elected for each province by the respective provincial councils and the members of the Union House of Assembly for the province sitting together. Four senators to represent the natives and by them elected have been added by the Representation of Natives Act, No. 12, of 1936. The Senate chooses a president from amongst its own members.

The House of Assembly was constituted on the basis of proportionate representation for each province. The present numbers are: Cape, sixty-one; Transvaal, fifty-seven; Orange Free State, sixteen; Natal, sixteen. Europeans have adult franchise; under the legislation of 1936 in the Cape, the natives elect three members of the House of Assembly and two members of the provincial council, additional to those already provided for; males alone vote on educational and property qualifications; the former Cape native franchise is repealed as offending against the fundamental Dutch doctrine of the paramount importance of racial differentiation, despite Rhodes' plea for equal rights for all civilised men. Europeans alone may be members, and the duration of Parliament is not over five years.

Deadlocks between the houses are dealt with by joint sittings, which may be convened at once in the case of money bills, and in the next session in other cases.

The Provincial Governments are composed of an administrator appointed by the governor-general, and holding office for five years, and a council composed of the same number of members as represent the province in the Union House of Assembly, but not less than twenty-five in any province. The provincial councils are elected for three years, and can only be dissolved by effluxion of time. They are presided over by a chairman chosen by the council. An executive committee of four members elected by proportional voting by the provincial council forms, with the administrator as chairman, the executive committee for the province. The system works badly, as the council is elected on political lines, but the executive is not responsible to it, and in the case of equal division of members the administrator virtually rules.

The Union Parliament possesses unlimited powers of legislation for the peace, order, and good government of the Union. The provincial councils have limited power to make ordinances: (1) with regard to certain subjects specified by the Act as later amended; these include local and municipal government, charitable institutions,

hospitals, fishing and game preservation, markets, and various licences; (2) on all matters which in the opinion of the governor-general in council are of a purely local or private nature; (3) on all other subjects which the Union Parliament may delegate to them. Provincial ordinances have effect only in so far as they are not repugnant to Acts of the Union Parliament. Elementary education is the most important subject in provincial hands, and the provinces are dependent on the Union for most of their finance, so that abolition has often been suggested, but this view is opposed by Natal, and the Coalition Union Government of 1933 negatived the policy. Provincial finances are derived from (1) subsidies estimated to cover education costs; (2) certain assigned revenues raised under Union Acts; (3) fees for services; and (4) local taxation on strictly defined subjects.

The governor-general fixes the times for sessions of the Union Parliament, prorogues Parliament, and may dissolve both Houses simultaneously, or the House of Assembly alone. Under Act No. 54 of 1926 he may dissolve the Senate within 120 days of a dissolution of the Assembly, and a new government may replace the nominated senators at discretion, as they then vacate their seats.

Constitutional change is carried out by simple Act, save that measures altering the rule of equality of languages or abolishing the Cape native vote must be passed in joint session with a two-thirds majority on third reading. The latter condition long preserved the native vote, but it was fulfilled in 1935 owing to General Smuts' abandonment of his former principle of preserving the Cape vote.

The Status of the Union Act, 1934, implements the Statute of Westminster, 1931 (*r*), and declares the sovereign independence of the Union, assigning sovereign legislative power to the Union Parliament; excluding the application of Imperial Acts unless enacted by the Union; vesting executive government in the King acting on the advice of Union Ministers only, and transferring to Union authorities all powers given to British authorities by Imperial Acts. The Royal Executive Functions and Seals Act, 1934, supplies the necessary machinery for the full execution of the Status Act (*s*).

The appointment and removal of officers of the public service, together with the command of the naval and military forces of the Union, is vested in the governor-general as representing the King.

The Union judiciary consists of the Supreme Court of South Africa, with an appellate division; the Supreme Courts in the former colonies becoming provincial divisions of the Supreme Court of South Africa. Appeal to the Privy Council in England does not lie from any division of the Supreme Court. But nothing in the Act is to impair the right of the Crown to grant special leave to appeal from the appellate division of the Supreme Court to the Privy Council, but Parliament may by reserved bill limit or abolish the right, which has been very seldom used (*t*).

(*r*) See p. 495, *ante*.

(*s*) Keith, *Journ. Comp. Leg.*, xvii, 289 ff; *The Dominions as Sovereign States*, p. 51.

(*t*) *Pearl Assurance Co. v. Government of Union of South Africa*, [1934] A. C. 570. Even this appeal raised complaint, and the abolition of the appeal has been mooted.

The English and Dutch languages—the latter is now defined to include Afrikaans, the true vernacular—are both official languages of the Union, and on a footing of equality. This requirement is being used to convert the civil service into a predominantly Dutch service; incidentally it operates to prevent immigration of railway workers from the United Kingdom. Free trade is also to prevail throughout the Union.

The law of the Union is based on Roman-Dutch civil law, much altered by legislation and affected by legal interpretation (*u*) so as to approach more closely to English law, which is largely adopted as regards criminal law and evidence.

**Defence.**—The defence forces of the Union rest under Acts of 1912 and 1922, on the obligation of every citizen between 17 and 60 to render service in war, while those between 17 and 25 are liable for training in peace for four years in the Active Citizen Force. Provision, however, is only made financially for 50 per cent. of those eligible being trained. There is a South African Permanent Force; a Coast Garrison Force; a Citizen Force; a Royal Naval Volunteer Reserve; and special reserves. Youths not trained in the Active Citizen Force are given facilities for rifle training. The Air Force is trained to suppress native unrest and to counter any attack by land from the north; coast fortifications at Cape Town and Durban are being strengthened against raid by sea and the Union guarantees the inland defence of the British Naval base at Simonstown under an agreement of 1921, when the British Government handed over the military control of the Union to the Union Government in return for promises of support.

#### *The Irish Free State.*

**The Separation of the Irish Free State.**—The Government of Ireland Act, 1920 (*x*), was rejected by the rebels in Southern Ireland, and the British Government in 1921, partly to conciliate United States opinion, partly because of the unpopularity of its barbarous methods of retaliation against the murderous proclivities of the rebels, decided to surrender the principle of union, and to come to terms with the malcontents rather than reduce them to submission. They had not been recognised even as belligerents by any foreign power, still less as a state; and the British Government insisted that it could not concede such recognition, though it allowed the instrument of settlement to be couched in quasi-treaty form, thereby giving rise to the quite arguable claim that recognition as a state was for the moment accorded.

**The Irish Free State (Agreement) Act, 1922 (*y*).**—This Act gives statutory effect to the articles of agreement for a treaty between Great Britain and Ireland of December 6, 1921, which confers on the Free State the same constitutional status in the British Empire as the Dominion of Canada; the representative of the Crown is to be appointed in like manner as the governor-general of Canada, and the constitutional

(*u*) R. W. Lee, *Introduction to Roman-Dutch Law* (1931).

(*x*) See p. 483, *ante*.

(*y*) 12 Geo. V. c. 4.

relations of Canada to the Crown and the Imperial Parliament are to be applied. Members of the Parliament must swear allegiance (2). The state must assume responsibility for its fair share of the public debt and pensions (a). Facilities as defined in peace and as desired by the British Government in war (b) shall be given for coastal defence. The military force of the state is not to exceed the same proportion to that of Great Britain as the population of one to the other. The ports of the Free State and Great Britain are to be open to the ships of the other country.

**The Irish Free State Constitution Act, 1922.**—The treaty was accepted by a small majority in the revolutionary legislature, and control was handed over under it to a provisional government. A new legislative chamber was summoned under proportional representation on the basis of the lower house of the proposed Parliament of Southern Ireland, thus including members for Trinity College, Dublin, who were not, of course, in the rebel ranks. By it as a constituent assembly was framed the constitution, which after concurrence by the British Government was enacted by the assembly as the Constitution of the Irish Free State (*Saorstát Éireann*) Act, 1922. It rested on that Act after 1931, as the British Act, the Irish Free State Constitution Act, 1922, could as such be repealed under the Statute of Westminster, 1931 (c). Both Acts made constitutional law subject to the treaty, but that provision was abolished by the Constitution (Removal of Oath) Act, 1933, a somewhat revolutionary measure.

The treaty was followed in principle in the constitution, but much was added, including a formal statement of fundamental rights. These were the co-equality of the Free State in the British Commonwealth of Nations; the assertion that all power of government was derived from the people; the definition of citizenship; the creation of Irish as the national language and English as an official language; the rule that no titles or honours could be conferred save with the approval of the executive council; the liberty of the person, inviolability of the citizen's dwelling; freedom of conscience and religion; free speech and right of assembly; free elementary education; and inalienability of the natural resources of the state. These rights, however, were subject to limitation by law, perhaps by ordinary Acts and in any case by constitutional changes, and they were invaded wholesale by the Public Safety Acts, and above all by the Constitution (Amendment No. 17) Act, 1931, which gave drastic powers of arrest and punishment by military Courts

(2) This requirement was abolished by the Constitution (Removal of Oath) Act, 1933, apparently in breach of the treaty, and the representative of the Crown was abolished by Constitution (Amendment No. 27) Act, 1936, and the Executive Powers (Consequential Provisions) Act, 1937.

(a) This requirement was waived by agreement of 1925, enacted by both Parliaments (15 & 16 Geo. V. c. 77), when also it was agreed that the boundary commission to settle the boundary with Northern Ireland should not complete its work, but the existing boundary should stand.

(b) This fact precluded the effective neutrality of the Free State in a British war, and was cancelled by agreement of April 25, 1938 (1 & 2 Geo. VI. c. 25). Cf. p. 494, *ante*.

(c) *Moore v. Att.-Gen. for Irish Free State*, [1935] A. C. 484.

in time of unrest, and a wide power of censorship, of control over public meetings, and suppression of disaffected associations. A very unsatisfactory feature was the power given to inflict punishments in excess of those authorised by law if a political motive was held to exist, and accused persons might be forced to incriminate themselves (*d*).

The legislature (*Oireachtas*) consisted of the King and two houses, the Chamber of Deputies (*Dáil Éireann*) and the Senate (*Seanad Éireann*). The former house was elected by adult citizens by proportional representation and numbered 153 (*e*). The Senate (*f*) was elected by the two houses by proportional representation from panels prepared by their direction. Senators must be thirty years old; they numbered sixty, holding office for nine years, one-third retiring every three years, but the Senate was abolished by Constitution (Amendment No. 24) Act, 1936, and the King eliminated by Constitution (Amendment No. 27) Act, 1936. Constitutional change up to 1938 could be made by simple bill, and in 1937 a new constitution was laid before the public prior to enactment and a dissolution, pending which it would not be made operative.

*The Executive* power (to be exercised as in Canada) was in 1922 vested in the King, acting through his representative, assisted by an Executive Council. The members of the council were appointed by the representative of the Crown on the recommendation of the President, who was nominated by the *Dáil*. By the Constitution (Amendment No. 27) Act, 1936, the intervention of the governor-general was dropped. The ministry was collectively responsible to the *Dáil* and must resign if its support was withdrawn; it could not arrange a dissolution on defeat, a very inconvenient rule, contrary to the regular practice elsewhere.

*The Judicature* consisted of a High Court of first instance and a Supreme Court of Appeal. The former could deal with all questions of law and fact, civil and criminal, including the validity of laws with regard to the constitution; the latter had appellate jurisdiction from all decisions of the High Court. The decisions of the Supreme Court were final and conclusive. The constitution, indeed, provided that nothing should impair the right to petition His Majesty for special leave to appeal to the Privy Council. But appeals were first effectively rendered useless by legislative action (*g*), and abolished in 1933 by the Constitution (Amendment No. 22) Act, 1933.

### *The Constitution of Éire.*

**Éire and the Commonwealth.**—By plebiscite of July 1, 1937, was approved a new constitution of Éire, or Ireland, passed by the *Dáil*

(*d*) Keith, *The Sovereignty of the British Dominions*, pp. 327, 341 f., 558.

(*e*) Electoral Acts, 1923 and 1927. By the Electoral (Revision of Constituencies) Act, 1935 (No. 5), the number is reduced from 1937 to 138, university representation being dropped, as it returned opposition leaders.

(*f*) Const. Arts. 31—35, as amended in 1928.

(*g*) *Performing Right Society v. Bray Urban District Council*, [1930] A. C. 377; *Wigg and Cochrane v. Att.-Gen. for Irish Free State*, [1927] A. C. 674; *Transferred Civil Servants (Ireland) Compensation Case*, [1929] A. C. 42. The validity of the abolition was pronounced in *Moore v. Att.-Gen. for Irish Free State*, [1935] A. C. 484.

in the preceding session. Under it the only legal connection with the British Crown consists of the fact that by Art. 29 for purposes of functions in respect of external relations, the government may, to such extent and on such conditions as may be prescribed by law, adopt any organ, instrument or method of procedure used for like purposes by members of any group or league of nations with which the State is or becomes associated. This permits the use of the King in accordance with the Executive Authority (External Relations) Act, 1936, in conclusion of treaties and appointment of diplomatic agents and consuls, and no doubt in signature of exequaturs for consuls from foreign states. But the constitution gives full right to the government to act without the King, and by legislation all external functions could be conferred on the President acting on the advice of the government. Eire is no longer declared to be a member of the British Commonwealth, as under Art. 1 of the Constitution of 1922; the treaty of 1921 is ignored, the position of the British forces engaged in coast defence being passed over. None the less on December 29, 1937, the decision of the British government and the other Commonwealth governments to accept the constitution as compatible with membership of the Commonwealth was duly announced. On April 25, 1938, British acceptance of the removal of British forces was given and the style Eire recognised by the Eire (Confirmation of Agreements) Act, 1938 (1 & 2 Geo. VI. c. 25).

**The President.**—This new office is elective (*h*), the whole of the voters using the system of proportional representation with the single transferable vote being the electorate. The term of office is seven years, subject to the possibility of removal on impeachment instituted by either house on a two-thirds vote of the membership; re-election once only is permitted. Candidates other than a retiring or former President must be nominated by twenty members of the legislature or four county councils. A presidential seal is provided by Act No. 37 of 1937. The President has command of the forces and power of pardon, but only on the advice of the government. He appoints the Prime Minister (Taoiseach) on the nomination of the Dáil, and the rest of the government, whose minimum number is seven, maximum fifteen, on the nomination of the Prime Minister with prior approval of the Dáil. He summons and dissolves the Dáil on the Prime Minister's advice. But he has a personal discretion to refuse a dissolution to a Prime Minister who has ceased to retain the support of a majority of the Dáil, and who therefore under the constitution must resign (*i*) or dissolve; if he then refused to resign, he could no doubt dismiss him. Further, he can, after consulting the Council of State, a body referred to below, summon the Senate or the Dáil to meet, thus preventing a Prime Minister evading the control of that body. Otherwise he has no control over the executive.

**The President and Legislation.**—All bills require signature by the President, normally within five to seven days from passing, but he

(*h*) Arts. 12, 13; Presidential Elections Act, 1937, No. 32; Act No. 24 provides for his establishment.  
(*i*) Art. 28 (10).

has certain powers which he can exercise, after consulting, but not necessarily in agreement with, the Council of State. (1) The Senate has in regard to money bills certified by the chairman of the Dáil only the right within twenty-one days to make suggestions which the Dáil can overrule. If it is claimed by the Senate that a bill is not a money bill, the President may refer the issue for final decision to a committee of privileges of equal numbers from each house, presided over by a judge with a casting vote (*k*). (2) If the Prime Minister certifies that a bill—not being a bill to amend the constitution—is immediately necessary for the preservation of the public peace and security, or by reason of the existence of a domestic or international emergency, the President may at the request of the Dáil curtail the normal period of ninety days allowed for Senate amendments, but, when passed, such an Act has operation for ninety days only, unless the two houses agree (*l*). (3) If a bill is passed over the head of the Senate after ninety days by the Dáil, the President may, at the request of a majority of senators and a third of the Dáil, rule the proposal containing therein to be of such national importance as to be proper to be submitted to the will of the people. In that case the bill drops, unless within eighteen months of his decision it is reaffirmed by the Dáil after a general election, or it is approved by referendum, and such approval is deemed to be given unless a majority, comprising at least a third of the voters on the register, declare against it (*m*). (4) The President may refer any bill of the constitutionality of whose provisions he is doubtful (other than a money bill, a bill to amend the constitution, or one whose discussion is abridged) to the Supreme Court, of not less than five judges, and he may not assent to it if the majority pronounces any clause invalid (*n*). All these powers are patently given to enable the President to secure that the Dáil shall not override the real wishes of the electorate, the political sovereign.

**The Council of State.**—Like the Presidentship, this is a new creation, obviously based on the idea of having a body of elder statesmen of impartial outlook (*o*). It has only advisory powers in the matters above referred to, but it must be consulted. It includes *ex officio* the Prime Minister, his deputy, the chief justice, the president of the High Court, the chairmen of the houses, and the attorney-general, who cannot be a member of the government (*p*), but holds office with it. Any ex-president, ex-prime minister, ex-chief justice, or ex-president of the executive council of the Free State may act, and the President may appoint up to seven members.

**The Senate.**—This body is created on a new basis of functional representation (*q*). The Prime Minister selects eleven members, each university elects three, and forty-three are elected, not more than eleven nor less than five out of each of five panels, representing the national language and culture, literature, art, education and professional interests (now given five members); agriculture and fisheries,

(*k*) Art. 22.  
(*n*) Art. 26.  
(*q*) Art. 18.

(*l*) Art. 24.  
(*o*) Arts. 31, 32.

(*m*) Arts. 27, 47 (2).  
(*p*) Art. 30.

(eleven); labour, organised and unorganised (eleven); industry and commerce (nine); public administration and social services (seven). Election must be, as for the Dáil, by proportional representation, but otherwise all else is left to law, save that provision is expressly authorised for conferring on functional or vocational groups or associations or councils the power to elect members in lieu of a like number of members from the above panels (*r*). The Seanad Electoral (Panel Members) Act, 1937, gives members of the Dáil the right to nominate candidates for each panel, and other nominations are made in fixed proportions by registered nominated bodies, annually revised by a registrar subject to control by an appeal committee of fifteen members of the Dáil. Of the members, twenty-two must be chosen from the Dáil nominees. As noted above, the powers of the Senate are limited to a brief delay, with, however, the possibility of obtaining, with the aid of a third of the Dáil, reference to the people of important bills. It can, like its predecessor, usefully suggest amendments.

**The Dáil.**—This body (*s*) remains in principle unchanged, but proportional representation with the single transferable vote and constituencies of three members at least, is made a part of the constitution; re-distribution is required every twelve instead of ten years; sex disqualification is negatived; and the maximum duration is fixed at seven as opposed to six years, but the existing legislative limit of five will remain unless altered by Parliament. The senate falls to be elected after the dissolution of each Dáil, and members remain senators until the day before the polling day, which must not be later than ninety days after the dissolution of the Dáil.

**Restrictions on Legislative Powers.**—The constitution for the first three years after the first President takes office may be altered by simple Act (*t*); but the President, after consulting the Council of State, may insist on procedure by referendum, which after three years is always compulsory, and the need for which cannot be abolished by any such Act (*u*). Any bill to amend the constitution must contain no other provisions; be enacted in ordinary course, over the head of the senate if necessary, but not under the abridgement of debate which is forbidden for constitutional laws; and be approved by a simple majority of the votes cast at a referendum (*x*). There is no limit to the power of change by this procedure, for all powers of government derive from the people, whose right it is to decide all questions of national policy (*y*). Otherwise there are a number of restrictions on legislative power, though, as in the constitution of 1922, most of the rights of the subject are subject to drastic restriction by ordinary legislation, and a very important provision (*z*) forbids the invoking of the constitution to invalidate any law expressed to be for the purpose of securing the public safety and the preservation of the state in time of war or armed rebellion, or to nullify any act done or purporting to be done under any such law. Moreover, the value of

(*r*) Art. 19.

(*u*) Art. 46.

(*z*) Art. 28 (3).

(*s*) Arts. 16, 17.

(*x*) Art. 47 (1).

(*t*) Art. 51.

(*y*) Art. 6 (1).

*habeas corpus* is severely reduced by the provision that it may not be used to interfere with any act of the defence forces in war or armed rebellion (a). But constitutional principles rendered immune from change normally are proportional representation; the fundamental principles affecting the senate and Dáil; the exclusion of denominational preference in education, and the endowment of religion. All religions existing in Ireland at the commencement of the constitution are recognised, though reference is made to the special position of the Roman Catholic Church as that of the great majority of the citizens (b).

Other fundamental principles are the sanctity of private property, qualified by the exigencies of the common good and the principles of social justice (c) and the inalienable and prescriptive rights of the family, antecedent and superior to positive law, but the only definite principle is refusal, as at present in practice, to allow of divorce, and the new refusal in certain obscure cases to recognise divorces of marriages good by Irish law (d). Insistence on the importance of home work for women is asserted (e), and the state is required to endeavour to ensure that organs of public opinion, the Press, the radio, the cinema, shall not be used to undermine public order or morality or the authority of the state, a provision (f) suggestive of inroads on freedom of speech and writing. The censorship of literature already exhibits all the traits of a retrograde moral outlook, and there is great danger to the freedom of the Press in efforts to uphold the authority of the state. Other principles directive of social policy are frankly stated not to be cognisable by any Court (g).

**The Executive.**—The Government (h) is virtually selected by the Dáil as above described through the Prime Minister, who is given formally the right to secure the removal of any colleague if he fails to resign on request. It must resign if it ceases to command the support of a majority in the Dáil, unless the President gives it a dissolution and it then recovers its majority. After a dissolution, ministers remain in office until they are re-elected or others chosen on the meeting of the Dáil; resignation and the formation of a new ministry before meeting Parliament are thus forbidden. Save during a dissolution, ministers must be members of one or other house, not more than two in the senate. Any member may speak in either House. The deputy Prime Minister is chosen by the Prime Minister and acts in his absence or incapacity or death until a successor is chosen. The ministry is collectively responsible and is required to submit estimates to the Dáil.

**The Judiciary.**—The existing judicial arrangements are retained in substance, the High Court alone having jurisdiction in first instance in constitutional cases, subject to appeal to the Supreme Court (i), which was enlarged prior to the new constitution. There is, of course, no appeal from its decisions. Judges can be removed only on

(a) Art. 40 (4) (iii).

(d) Art. 41 (3).

(g) Art. 45. They are all very vague and very noble.

(h) Art. 28.

(b) Art. 44 (1).

(e) Art. 41 (2).

(c) Art. 42.

(f) Art. 40 (6).

(i) Art. 34 (3), (4).

resolutions of both houses for stated misbehaviour or incapacity; they are independent in their functions and subject only to the constitution and the law (*i*). The difficulty that existing judges had sworn to observe the constitution of 1922, with which the new constitution is inconsistent, for instance, as regards the Crown, is solved by requiring (*k*) judges either to make a declaration binding them to observe the new constitution or to resign; as the constitution has been approved by plebiscite, resignation cannot be deemed morally incumbent.

**Military Tribunals.**—The rules affecting judges have no application to extraordinary tribunals which can still be set up. Special Courts may be established by law to operate in cases where the ordinary Courts are inadequate to secure effective administration of justice and the preservation of public peace and order (*l*). This covers the case of such a tribunal as the Constitution (Special Powers) Tribunal created under the Constitution (Amendment No. 17) Act, 1931, which lapsed on the entry into effect of the constitution. On February 7, 1939, as a sequel to bomb outrages in England and one in Eire, Mr. de Valera announced the introduction of legislation to assert the power of the government to restore order, by a Treason Act and an Offences against the State Act. Military tribunals may also deal with acts done in a state of war or armed rebellion, and in such Courts as in special Courts the rule of jury trial and appeal to civil Courts will not apply (*m*). The rule of law, therefore, in Eire is seriously undermined.

**Eire and Northern Ireland.**—The new constitution claims for Eire the whole of Ireland, its islands and territorial waters, and asserts the right of government and legislation over that area (*n*). But, pending the integration of the national territory, the laws enacted are restricted in effect as were those enacted by the Free State. In order to further integration, the constitution permits the recognition of subordinate legislative powers (*o*), provides against religious endowment or discrimination on ground of religious profession, belief, or status (*p*), forbids denominational discrimination in education (*q*), and conserves proportional representation (*r*). But it definitely gives Irish a preference as the national language, though English is given second place, and it allows the use of one language only to be demanded even in the whole of Eire for any governmental purpose, going far beyond the provisions of the constitution of 1922 (*s*). Irish, it must be remembered, is for uses of law and commercial and governmental life an artificial language, which is being deliberately created, and must tend to shut Ireland out from intellectual intercourse with the overseas Irish. Moreover, the enactment of the tricolour, green, white and orange, as the national flag (*t*) is impossible of acceptance in the north, whose government has responded by firm and widely supported assertions of determination not to accept any form of association

(*i*) Art. 35 (2).

(*m*) Art. 37 (4).

(*p*) Art. 44 (2) (ii) and (iii).

(*r*) Art. 16 (2) (v).

(*k*) Art. 58 (6).

(*n*) Arts. 2, 3.

(*s*) Art. 8.

(*l*) Art. 37 (3).

(*o*) Art. 15 (2).

(*q*) Art. 44 (2) (iv).

(*t*) Art. 7.

with Eire, but to remain an integral part of the United Kingdom. Mr. de Valera, on the other hand, having strengthened greatly his position by Mr. Chamberlain's surrender of British rights, has intimated that Northern Ireland must be surrendered if cordial relations are to exist, and above all, if Eire is to be effectively neutral in case of attack on Britain. But on February 7, 1939, he pointed out that Northern Ireland must accept (1) bilingualism; (2) the right of secession, and (3) the right of neutrality, and omitted to express moral condemnation of the Irish Republican army's campaign in England and Northern Ireland.

**Irish Citizens.**—The position as regards nationality of citizens is not affected by the new constitution, save that they become "citizens of Ireland." They remain, it may be presumed, British subjects outside Eire, so that a declaration of a Republic would still leave them British subjects outside the territorial limits of Eire. This conclusion is strengthened by the results of the Imperial Conference of 1937 (*u*). The suggestion was there pressed by General Hertzog that the term British subject should be confined to subjects of Great Britain (a phrase meaningless in law), and that each member of the Commonwealth should define the members of the community for such purposes as extra-territorial jurisdiction, the exercise of diplomatic protection, inclusion in treaties, right of immigration and liability to deportation. The British Government, as well as those of Australia and New Zealand, declined to take such action, and it was pointed out that British subject meant a subject of the Crown to whatever part of the British Commonwealth he belonged. No secession, therefore, if unilateral on the part of a Dominion, could sever the connection outside the Dominion of its nationals with the Crown, and secession therefore requires action by the United Kingdom as well as by a Dominion to make it legally complete. Like considerations apply to neutrality, though the surrender in 1938 of British control of coastal defence renders *de facto* neutrality much more likely of acceptance by foreign states.

**Defence.**—There is a small voluntary force, of about 589 officers and 5,885 men, but no serious navy, and only a small air force.

**The Commencement of the Constitution.**—The constitution took effect on December 29, 1937. The Dáil (*x*) functioned as the legislature until a senate was duly elected within 180 days and a commission composed of the chief justice and the President of the High Court with the chairman of the Dáil exercised the functions of the President until Mr. D. Hyde, a Protestant but a veteran supporter of the revival of the Irish language, was appointed and installed on June 25, 1938. A general election on June 18 had given Mr. de Valera an emphatic majority of seventy-seven supporters. Due provision was made for the smooth transformation of the organs of the Free State into the corresponding organs of Eire, and the issue in due course of fresh com-

(*u*) Parl. Pap., Cmd. 5482, pp. 23—28.

(*x*) Arts. 54, 55.

missions to the officers of the defence forces. Both as regards external and internal affairs, there was provided continuity between the old and new states on the repeal of the old constitution by the taking effect of the new (*y*). A formal vesting (*z*) of all powers and prerogatives of the Crown prior to December 11, 1936, in the people, to be exercised by the government save as otherwise provided by the constitution or by law, is hardly necessary, for Art. 2 of the former constitution made the people supreme, and the declaration (*a*) that Ireland is a sovereign, independent, democratic state can raise no difficulty, save as regards the use of the term "Ireland"; the original draft had "Eire" in the Article. A most distinguished preamble introduces the new constitution, but, very quaintly, despite the sound principle (*b*) that the language in which a measure is enacted should determine the authentic text, and the fact that the Irish version of the constitution is a laborious translation from English, the former is made authoritative for interpretation (*c*). Yet most of the judges, counsel, and legislators are ill-versed in that form of speech.

**New Zealand.**—This Dominion has a unitary constitution, a governor-general, a legislative council, whose members are, since 1891, nominated for seven years, and the House of Representatives, of eighty members elected by adult suffrage, four being Maoris elected by their countrymen.

There is a small permanent force, for training purposes; compulsory training is not now adopted, but there is a volunteer territorial force. There is a small air force, and a New Zealand Division of the Royal Navy, which under the Naval Defence Act, 1913, is under sole Dominion control in peace, while in war it will pass to British control.

**Newfoundland.**—Owing to financial difficulties, necessitating Imperial subventions to prevent default in 1933, a Royal Commission was appointed to report on the island's position. It recommended Imperial aid and control, the constitution to be suspended and legislation and executive action to be entrusted to the governor aided by a commission of six members, selected by the British Government, three local men, three from the United Kingdom. The British Government accepted the report and agreed to guarantee a new issue of stock at 3 per cent. to be offered to holders of existing stocks, and effect was given to this by the Newfoundland Act, 1933 (24 Geo. V., c. 2), and Letters Patent and Royal Instructions of January 30, 1934. Labrador is an integral part of the territory, but is only in part under administration. It appears that there is a good deal of feeling against the loss of political rights, but the economic position in 1937—39 still necessitated a very large British subsidy, which is inconsistent with self-government.

**Dominion Laws.**—The basis of the laws of the Commonwealth of Australia, Federation and States, of New Zealand, Eire, and Newfoundland is English law. That is true of all of Canada except Quebec, which had assigned to it by the Quebec Act, 1774 (14 Geo. III., c. 83) the old French law which it had on cession in 1763. This was based

(*y*) Arts. 49, 50, 59—61.

(*a*) Art. 5.

(*b*) Art. 25 (4), (5).

(*z*) Art. 49 (1).

(*c*) Art. 63.

on the Custom of Paris, and so Quebec did not obtain the benefits of Napoleon's codes. Its law has naturally been modernised in the light of the codes as well as of English law, but it remains in many points different from English law; criminal law is fortunately federal, and federal legislation follows English legal doctrines as a whole. The Roman Dutch law of the Union has been mentioned.

**Dominion Nationality.—Canada.**—The development of Dominion autonomy has been accompanied by the creation of distinctive Dominion nationalities. Canada led the way, because of the desire of the Dominion to be able to put forward a Canadian as a nominee for election to the Permanent Court of International Justice in addition to the British nominee, whose election was assured. Canada defines (*d*) her nationals as British subjects who are Canadian citizens within the meaning of the Immigration Act, the wives of such citizens, and any person born out of Canada whose father was a Canadian national at the time of his birth, or, in the case of persons born before the Act of 1921, if the father possessed the qualifications of a national. Citizenship is ascribed to persons born in Canada who have not become aliens; to British subjects who immigrate after five years' residence, which gives them domicile; and to naturalised persons under Canadian law who do not become aliens or lose domicile. The latter two classes can lose domicile by one year's absence. It will be seen that as a rule Canadian nationals are also British nationals, though the rule of automatic acquisition of nationality by descent, in place of the more restricted British system (*e*), will permit divergence.

**Union Nationality.**—The terms of the Union nationality legislation are rather more complex. Nationality is obtained by birth in the Union, including children of British subjects born in South West Africa, unless the person is an alien or a prohibited immigrant; by British subjects who are lawfully within the Union and have been there domiciled after two years, so long as they retain that domicile; by naturalised British subjects after three years' domicile while they remain domiciled and do not become aliens; and by persons born outside the Union if the father was a national at the time of birth, or would have been a national if the law had then been in force, provided he would not be a prohibited immigrant if he entered the Union. The wife of a national is herself a national, and may retain nationality if her husband loses it by declaration. As in Canada, nationality may be renounced (*f*). But, contrary to Canadian law, by the legislation of 1931 (No. 41) and later, the franchise is restricted to nationals and by the Status of the Union Act, 1934, membership of Parliament is so restricted.

**Irish Nationality.**—While in the Union British nationality is fully respected in the existing law, though desire to get rid of it has been at times expressed and action suggested to abolish double nationality as existing under the British Nationality in the Union and Naturalisation and Status of Aliens Act, 1926, which is in accord with British

(*d*) In 1921 (c. 4).

(*e*) See p. 427, *ante*.

(*f*) No. 4 of 1927.

legislation (g), in the Irish Free State the Irish Nationality and Citizenship Act, 1935, aimed at divorcing Irish nationality from British. The constitution gave Irish citizenship to all persons domiciled in the area which at first nominally constituted the State, including Northern Ireland, on December 5, 1922, if (1) they were born in Ireland, or (2) either parent was so born, or (3) they had been ordinarily resident for seven years. Further provision was delayed until 1935, when the constitution was plainly inadequate to meet the case of children born since December 5, 1922. It gives nationality to (1) all persons born on or after December 6, 1922, in the Free State proper, and (2) to persons born on ships therein registered. Persons born outside the State of Irish citizen fathers are also natural-born citizens. But, if born after April 10, 1935, to secure that status the birth must be registered within, normally, a year in a foreign births entry book kept at a State legation or consulate, in a special Northern Ireland register, or in the foreign births register kept in the State itself, and, within a year after attaining age twenty-one, he must declare his retention of citizenship and divest himself of any foreign nationality. Persons born in Ireland, or of one parent at least of Irish birth, but not citizens under the constitution, become so on taking up permanent residence in the State, or may, if permanently resident outside, like Mr. Bernard Shaw, obtain citizenship by registration. The rules of acquisition of nationality do not apply to children of diplomats, and may be renounced by children of consuls or by their father for them. Naturalisation is provided for, residence in the State alone being taken into consideration or service for it outside. The status of married persons is very elaborately regulated so as to minimise change of nationality on marriage, except by deliberate intention and in close relation to place of permanent residence. Loss of citizenship by naturalisation elsewhere is provided for. Exchange of citizenship rights on the basis of mutuality with other countries is allowed (h), but clearly not so as to give political rights or privileges conferred on Irish citizens as such. The British Nationality and Status of Aliens Acts of 1914 and 1918 are repealed, and the common law ceases to have effect; the facts which make any person a citizen shall not of themselves confer on such person any other citizenship, and all citizens are such for all purposes municipal and international.

The effect of this legislation remains obscure, though its intention is plain. It seems most consonant with the authority due to the State legislation under the Statute of Westminster, 1931, to hold that Irish citizens in State limits (*i.e.*, Eire) should not be deemed British subjects, but that without such limits they resume such nationality under British law. It is more difficult to say what the position is of children born after April 10, 1935, who may be said not to be born within the allegiance, at least if born after the elimination of the Crown from the executive government of the State under the Constitution (Amendment No. 27) Act, 1936. But, as the King is still recognised for purposes of

(g) See p. 427, *ante*.

(h) All nationals or subjects throughout the Empire were exempted from the Aliens Order, 1935, by the Aliens (Exemption) Order, 1935.

external affairs, and as Mr. de Valera acquiesced in the terms of the Coronation oath of George VI. (i), it may fairly be said that all persons born in Eire are still in the eyes of British law British subjects, at least outside the limits of Eire.

**The Imperial Conference of 1937 and the Issue of Nationality.**—The Union government had proposed to accelerate Imperial disintegration by securing British agreement to the restriction of the term "British subject" to "subject of Great Britain," thus destroying the present bond of a common allegiance and a British nationality. The arguments adduced were that it was desirable to have clear distinctions between nationals of the various parts of the Commonwealth for various purposes: (1) the right of immigration should belong only to nationals; (2) liability to deportation of non-nationals involved definition of the unit to which they belonged as bound to accept them on return; (3) Dominion treaties should stipulate for their nationals and British for nationals of Britain; (4) diplomatic protection should be afforded to nationals of each unit by its agencies; and (5) each unit should exercise its extra-territorial jurisdiction over its nationals. The British government, while recognising the convenience of definitions of special nationalities for such purposes, made it clear that it would not attempt to provide distinct nationalities for the United Kingdom, India and the rest of the subordinate Empire, and that it would adhere to the plan of affording its aid and protection to all British subjects, whatever their specific nationality. It agreed that for such nationalities it would be fair for units to claim those born therein, or naturalised, or who became British by annexation of territory, and those others who came thither from other units to settle. But it was pointed out that there were difficulties regarding the latter category, and it was agreed that Dominions which legislated on the issue should consult other units as to the terms to be adopted. Neither Australia nor New Zealand showed any desire to legislate in such a manner as to terminate the British nationality of their subjects (k).

**National Flags.**—The Union, by the Union Nationality and Flags Act, 1927, created two flags, one of the Union Jack, and one of the special Union flag which embodies a miniature Union flag with the former Transvaal Vierkleur and the Orange Free State flag in a heraldic design of remarkable incorrectness. The Irish Free State had a distinctive flag prescribed for use, except on the marine, which adhered in 1937 to the Union Jack with badge under the Merchant Shipping Act, pending Irish legislation. The constitution of Eire by Art. 7 definitely establishes the tricolour of green, white and orange as the national flag. New Zealand and Newfoundland, by statute, use the marine flag with Dominion badge on land, and, by regulation, Australia follows the same course. A distinctive flag for Canada has not yet been provided for by law; the Union Jack with Dominion badge is in official use on buildings overseas.

(i) See p. 126, *ante*.

(k) Parl. Pap., Cmd. 5482 (1937).

**Inter-Imperial Co-operation.**—Relations between the Dominions and the United Kingdom are now conducted in several ways. (1) The Prime Ministers can communicate direct, and do so on very important issues, such as the royal abdication in 1936. (2) Communications may be exchanged between the Dominions Office and the Department of External Affairs of each Dominion, which is normally under the Prime Minister; in the Commonwealth of Australia the offices are not at present combined (*l*). (3) Further, there are High Commissioners for each Dominion in London, and in the Dominions, including, from 1939, New Zealand, where the governor-general earlier represented the British Government, High Commissioners for the United Kingdom. With the King the Union of South Africa and Eire communicate direct, and the other Dominions may do so.

**Imperial Conferences.**—The Imperial Conferences form the more formal mode of concerting policy. Four-yearly meetings were planned in 1907, but the first conference since 1930 was that arranged for 1937, contemporaneously with the royal coronation. The resolutions of conferences are entirely without coercive force. They are agreements which governments will keep if they find them approved by their legislatures; otherwise they need not press them, nor do they bind a new government (*m*). Normally only unanimous resolutions are passed. But the conferences have special value in securing contact between the governments, and they afford excellent opportunities for confidential examination of foreign policy and defence in conjunction with the Imperial Defence Committee, following the precedent of 1911, when first the Dominions were initiated into the schemes of British foreign policy and defence in connection therewith. Economic problems can also be treated, but in 1937 Australia preferred to postpone action to amend the Ottawa Agreement of 1932 until after the conference, while Canada had reached accord earlier.

**The Conference of 1937.**—The conference being between governments, the Prime Ministers are the essential members, while they take with them such other ministers as are able to deal with the issues to be discussed. The British delegation in 1937 comprised the Prime Minister, Lord President, the Chancellor of the Exchequer, to be the next Prime Minister, the Home, the Dominions, and Colonial Secretaries, the Lord Privy Seal, and, for foreign affairs, the Foreign Secretary, the Minister for Co-ordination of Defence, and the President of the Board of Trade, who, with the Minister of Agriculture, would also deal with economic questions. The Secretary of State for India attended as head of the Indian delegation, for India since 1917 has been an equal member of the conference. It is significant that, though issues of foreign affairs and defence were placed first in the agenda, the Minister of Defence of the Union was not included in its delegation.

(*l*) Mr. Hughes held the external affairs portfolio in 1938—39. The separation will not necessarily be permanent.

(*m*) So in 1924 the Labour Government did not act on the economic accords of 1923, but left preference to be rejected by its majority with the Liberals in the Commons.

In the sphere of constitutional affairs the issues propounded were those of nationality, the Union desiring, as we have seen, to get rid of the term British subject perhaps in favour of subject of the King, thus dissolving the common tie of British subjecthood which in British law is identical with nationality (*n*), treaty procedure, the international status of the members of the Commonwealth, and channels of communication between them. Very slight results were reached on those heads beyond making it clear that each Dominion was free to determine its own foreign policy; that no agreement for common defence action was possible; and that any hostility based on ideologies was undesirable, a doctrine contrasting with the totalitarian view that the best basis for co-operation is community of ideals, a principle justified by the complete success of its operation, since the Conference, in securing an effective working alliance of Germany, Italy, Hungary, Czechoslovakia, Japan, and Spain under General Franco; it is interesting that President Roosevelt shares the view that nations of common ideas should co-operate, and has given Canada assurances of United States protection against aggression. The discussions on trade, shipping, and air were confined to a general review of the progress of inter-Empire trade, a review of the work of the Imperial Economic Committee, shipping policy arising out of the work of the Imperial Shipping Committee, and civil air communications, while immigration was barely touched on.

The conference as it now stands was constituted by resolution of the Colonial Conference of 1907, modified later as to India. Its first regular meeting in 1911 was followed by meetings in 1917 and 1918 at the same time as meetings of what were styled Imperial War Cabinets, in which the heads of the colonial Dominion delegations joined with the British War Cabinet (*o*). But the meeting of 1921 was in effect a conference, as were those of 1923 and 1926 and 1930 referred to above.

**Inter-Imperial Disputes.**—In 1930, as a result of Dominion autonomy, a grudging recognition was accorded to the desirability of setting up machinery to dispose of issues between units of the Commonwealth such as would in the case of foreign powers be referred to the Permanent Court of International Justice. It was found impossible to arrive at any agreement for compulsory reference to a tribunal, and all that was agreed upon was that the tribunal used, if any disputes were referred, should be *ad hoc*, and be composed of five members: each unit would select two, one from outside its area, and the four would choose a fifth, all nationals of the Commonwealth. The Irish Free State refused in 1932 to accept such a tribunal, and no tribunal has ever sat (*p*).

(*n*) See Dicey and Keith, *Conflict of Laws*, pp. 111 ff., 896 ff., for full proof of this proposition, which is absurdly denied in the Union of South Africa.

(*o*) See p. 152, *ante*. For the conference, see Keith, *Governments of the British Empire*, pp. 180 ff.

(*p*) The issue was discussed in Canada, House of Commons, May 25, 1938, but is generally treated as dead. See Keith, *The Dominions as Sovereign States*, pp. 137 ff.

**The Divisibility of the Crown.**—This issue has been carried far by the effect of the abdication of Edward VIII. As has been seen (q), the Union of South Africa held it effective on December 10, the Irish Free State on December 12, while for the rest of the Empire the date was December 11, 1936. In a sense, therefore, divisibility is a *fait accompli* in face of which the pronouncement of indivisibility seen in the old case of *Williams v. Howarth* (r), where the issue was merely the possibility of a soldier drawing pay, both from imperial and colonial funds, without deduction, is of minor importance. It remains open how far unilateral right to walk out of the Empire as asserted by Dr. Bodenstein (s), apparently with the approval of General Hertzog, could be legally effective to sever the bond. The issue is not really governed by any precedent; in the case of the Union it is not urgent, though the Nationalist party insists upon it, and is steadily working to a reunion with the Dutch elements of the united party on this basis. It is significant that the Premier's son has advocated, against his father, this policy. Its strength has already been seen in the decision at an early date to terminate the use of the British National Anthem in the Union (t).

In the case of the Irish Free State the doctrine of external association, carried out in the legislation of 1936, and forming the basis of the constitution of Eire of 1937, alters the complexion of the whole question. Reconciliation between Eire and Great Britain on the basis of the surrender of Northern Ireland must be ruled out, and the issue thus defies early, perhaps any, satisfactory solution.

(q) See p. 124, *ante*.

(r) [1905] A. C. 551.

(s) Keith, *The King, the Constitution, the Empire and Foreign Affairs, 1936—37*, pp. 83 ff.; *The Dominions as Sovereign States*, pp. 120 ff.

(t) A demand to make the Dutch the only National Anthem was defeated on February 7, 1939, by 88 to 22 votes, but Roberts' Heights have been renamed Voortrekkerhoogte on the plea that Dutch youths will not serve in the defence forces if associated with a British name, and the Government has endeavoured to secure acceptance by the British of the generic name "Afrikaner."

## CHAPTER III.

## THE COLONIES AND MINOR POSSESSIONS.

**The Definition of Colony.**—By the Interpretation Act, 1889, a colony is defined as being “any part of His Majesty’s dominions, exclusive of the British Islands and of British India” (a), to which “and of British Burma” is added by the Government of India Act, 1935 (s. 311), and for the purposes of the definition, where parts of such dominions are under both a central and a local legislature, all parts under the central legislature are to be deemed one colony (b). In Acts passed after the Statute of Westminster, 1931, the term does not include Dominions, provinces or states.

According to the circumstances under which they are originally acquired, colonies may be classified as either settled, conquered, or ceded.

**Settled Colonies.**—A colony is said to be *settled* when at the time of occupation it is uninhabited, or sparsely inhabited only by tribes whose laws and customs are inapplicable to a civilised race. Australia may be taken as a type of such a colony; others are British Columbia, Manitoba, Saskatchewan, Alberta, the Yukon, the North West Territories, Newfoundland, Barbados, Bahamas, Bermuda, the Leeward Islands, British Honduras, Papua, &c. Even Kenya is ranked in this category in the Kenya Colony Order in Council, 1921, though, when the constitution was given by Letters Patent of September 11, 1920, this position was not apparently realised.

**English Law.**—In settled colonies the settlers carry with them the English common law (c), and so much of English statute law as is applicable to them under their particular circumstances. But English ecclesiastical law is not carried by English settlers into a new colony (d), and it is a matter of difficulty to decide what statutes are introduced; is the criterion the condition of the territory at the time of settlement, or at the time when it is proposed to determine the issue? (e). The

(a) 52 & 53 Vict. c. 63, s. 18 (3). For the exclusion of the Dominions, see p. 496, *ante*.

(b) The British Islands include the United Kingdom, the Channel Islands, and the Isle of Man: *ib.* s. 18 (1). See p. 461, *ante*. On the central legislature issue, see *McArthur v. Williams* (1936), 55 Commonwealth L. R. 324.

(c) *Pictou Municipality v. Geldert*, [1893] A. C. 524; *Lauderdale Peerage Case* (1885), 10 App. Cas. 692; *Cooper v. Stuart* (1889), 14 App. Cas. 286; for Penang as possibly settled, see *Yeap Cheah Neo v. Ong Cheng Neo* (1875), L. R. 6 P. C. 381.

(d) See p. 418, *ante*.

(e) The first view is taken in *Quan Yick v. Hinds* (1905), 2 Commonwealth L. R. 345, 356; the latter in *Cooper v. Stuart*, *ubi supra*. For the difficulty of decision, see *Whicker v. Hume* (1858), 7 H. L. Cas. 124, 161, *per* Lord Cranworth. The character of the legislation is also relevant; is it legislation presumably intended only in view of the special conditions of England? Cf. *Att.-Gen. v. Stewart* (1817), 2 Mer. 143, 160.

same question arises in all cases of colonies wherein English law is by statute introduced as from some definite date. Such portions of statute law as the Mortmain Acts (*f*), the Statutes of Limitation and the Marriage Acts (*g*) have been held inapplicable to certain colonies.

It is a quite distinct question whether an Imperial Act, whenever passed, is to be construed as legislation for the colonies generally as well as for the United Kingdom; the Wills Act (7 Will. IV. & 1 Vict. c. 26) has been held inapplicable to the Colonies and India (*h*), and similarly as regards the Companies Acts (*i*).

**Legislative and Constituent Powers.**—Obviously in any territory new legislation is requisite, but in settled colonies the Crown—apart from statute—has no ordinary legislative power. It can, however, confer a constitution of the English type, as near as may be, *i.e.*, a legislature of elective character, with a nominee council, which can make laws and tax. It was under this power that Vancouver Island in 1856 was given such a constitution, as had Bermuda in 1620 and most of the American colonies. If any other form of constitution was to be accorded, legislation was necessary, as in the case of Australia in 1823 and British Columbia in 1858. A general power to establish such constitutions is given in the British Settlements Act, 1887 (*k*). His Majesty in Council is empowered to establish such laws and institutions, constitute such Courts and officers, and make such regulations for the administration of justice in any British settlement as to His Majesty may seem fit, but this is only applicable where representative government has not been granted. The Act represents a consolidation of legislation, found necessary at an earlier date, to provide for the government without a representative legislature of the Falkland Islands and the British Settlements in West Africa. It has been used to authorise control under the High Commissioner for the Western Pacific of certain islands in the Western Pacific which may be regarded as settled, and of the Ross Dependency of New Zealand in 1933. Not only is the Crown in Council authorised to legislate (*l*), but the power may be delegated by any instrument under the Great Seal, or by instructions under the royal sign manual to any three or more persons in the colony (*m*).

**Native Law.**—If in any colony, whether settled, conquered, or ceded, there exists already a native population with laws and customs of their own, though from their nature inapplicable to Englishmen,

(*f*) *Mayor of Canterbury v. Wyburn*, [1895] A. C. 89. On the other hand, see *Hoyles, In re; Row v. Jagg*, [1911] 1 Ch. 179.

(*g*) *Catterall v. Catterall* (1847), 1 Rob. Eccl. 580.

(*h*) *Foy, In the Goods of* (1839), 2 Curt. 328.

(*i*) *New Zealand Loan Co. v. Morrison*, [1898] A. C. 349.

(*k*) 50 & 51 Vict. c. 54. The legality of the exercise of the power in the case of the Ross Dependency is doubtful: Keith, *Responsible Government in the Dominions*, i, p. xviii; *The Dominions as Sovereign States*, p. 670; as legislative power is given to one person only, not to three at least within the settlement, as in the Act is required. In the case of Western Pacific a retrospective validation of legislation probably invalid on this score took place in 1916: *Pacific Islands Regulations (Validation) Act, 1916* (6 & 7 Geo. V. c. 9).

(*l*) 50 & 51 Vict. c. 54, s. 2.

(*m*) *Ib.* s. 3.

these laws and customs are not generally entirely suppressed, but retained and respected as personal or tribal in character so far as is compatible with the dictates of humanity. So the Hindu and Muhammadan laws and customs relating to marriage, inheritance, &c., are respected and enforced as personal or tribal in character in the Courts of British India, and the laws and customs of the natives of the Gold Coast (n), of the aborigines of New Zealand, and of the natives and to some extent of the Indians of South Africa (o), have been statutorily preserved. Land questions are specially safeguarded in most territories and often as in the Gold Coast are disposed of by native Courts (p).

**The Nature of Cession.**—An important decision in 1938 decided that a colony is for purposes of constitutional law ceded when it is handed over by the consent of its people and leaders, whether European, as in Malta, or native, as in Fiji (1874), Basutoland (1868), or the Gilbert and Ellice Islands (1915), and can be regulated at the absolute discretion of the Crown, which may, as in the case of Malta in 1813, disregard the former rights of the people and impose on them a purely autocratic rule (q).

**Conquered and Ceded Colonies.—Legal Systems.**—In conquered colonies and in ceded colonies, where a system of civilised laws already exists, this continues in force until altered by the new sovereign (r), and in fact where such a system has been thoroughly established it is generally preserved: e.g., French law in St. Lucia, Quebec, and Mauritius and Seychelles; Roman-Dutch law in Ceylon, the Cape of Good Hope, Transvaal and Orange River Colony, whence it was extended to Natal and Southern Rhodesia, and for Europeans to Basutoland, the Bechuanaland Protectorate, and Swaziland. This is sometimes expressly stipulated in the treaty or articles of capitulation by which a colony is acquired. But such stipulation affects merely the question of international rights; there is no obligation in municipal law on the Crown to maintain the law, and it is a matter of policy how far this can be done. Unless confirmed by treaty, articles of capitulation are not even binding internationally; the claims of French Canadians, which were sometimes based on the capitulations of Quebec and Montreal in 1759—60, were invalid, save in so far as included in the Treaty of Paris, 1763. Only in British Guiana of all the colonies could it be said that any treaty obligation to maintain the existing constitutional position as to taxation and the general law existed, and that was so carefully respected that the constitution remained unaltered until 1928, though the original legal system was altered in 1917. In Trinidad Spanish law has practically been eliminated by local legislation and judicial interpretation. But laws

(n) Ordinance No. 4 of 1876. So in Gambia, Sierra Leone, Nigeria, Kenya, Nyasaland, Uganda, Fiji, Ceylon, &c.

(o) 15 & 16 Vict. c. 72, s. 71. For native law in South Africa, see Kennedy and Schlosberg, *South African Constitution*, pp. 399 ff.

(p) *Abakah Nthak v. Anguah Bennieh*, [1931] A. C. 72.

(q) *Sammut v. Strickland*, [1938] A. C. 678.

(r) See *Campbell v. Hall* (1774), 20 St. Tr. p. 323.

contrary to the fundamental principles of the British Constitution cease at the moment of conquest or cession, and therefore torture, which was legal under the old law of Minorca, could not legally be inflicted by an English governor (s), nor in Trinidad (t), and was forbidden in the Cape on the British occupation in 1796 and similarly in Ceylon in 1801.

Where such a system of laws, however, has not been established, English law is introduced.

It seems that British subjects cannot take possession of a foreign country in their own right. If they acquire it by settlement the authority of the Crown extends to them, and if by conquest, it becomes a dominion of the King in right of his Crown (u). In 1842 the Sultan of Brunei granted to Sir James Brooke (commonly called "Rajah Brooke") the government of Sarawak subject to tribute. In 1853 the tribute was remitted, and he was given power to appoint a successor. In 1855 a British commission was appointed to inquire into the status of Rajah Brooke in Borneo. The commissioners did not definitely define the position, but they inclined to the opinion that, in face of the statutory assertion of the sovereignty of the Crown over the territory of the East India Company (53 Geo. III. c. 155, s. 95), no British subject could attain (apart, of course, from inheritance of an existing realm) to the position of an independent ruler of a foreign country. In 1864, however, a British consul was appointed to Sarawak, recognising its foreign character, which in 1888 became a British Protectorate by agreement with Rajah Brooke (x). A like position was in the same year conceded to North Borneo under the chartered British North Borneo Company.

**Legislative Power of Crown.**—In conquered and ceded colonies, by virtue of the prerogative the Crown enjoys by constitutional law the right of creating any form of constitution, of legislation, of appointing executive officers, and establishing Courts of justice. This right cannot be questioned in English Courts, though the Crown's action may be open to international irregularity if and in so far as this right has been restricted by the articles of capitulation or by treaty (y). This right of legislation may be exercised by Order in Council, and also by proclamation or letters patent (z).

(s) See judgment of De Grey, C.J., in *Fabrigas v. Mostyn* (1773), 20 St. Tr. p. 181.

(t) *R. v. Picton* (1802), 30 St. Tr. 225.

(u) See *per* Lord Mansfield in *Campbell v. Hall*, 20 St. Tr. p. 287 (settlement), and for conquest, 20 St. Tr. pp. 322, 323; House of Commons resolution, May 10, 1773, as to India; Keith, *Const. Hist. of India* (2nd. ed.), p. 70. The Court in *Sammur v. Strickland*, *ubi supra*, held without doubt that Malta became British only when the Prince Regent in 1813 for the Crown announced the decision to give the Maltese status as British.

(x) Report of Commissioners, 1855, p. 19; and see Hertslet, *Comm. Treat.*, xviii, 227.

(y) As to this right generally see judgment of Lord Mansfield in *Campbell v. Hall* (1774), 20 St. Tr. pp. 320 ff., where the distinction between constitutional and international law is not drawn, as it must now be.

(z) See *Jephson v. Riera* (1835), 3 Knapp, p. 152. For Orders in Council, see *Abeysekera v. Jayatilake*, [1932] A. C. 260 (Ceylon); *Gout v. Cimitian*, [1922] 1 A. C. 105 (Cyprus). For letters patent, see Malta Constitution Letters Patent, 1921—1936; Southern Rhodesia Constitution Letters Patent, 1923—37; Letters Patent for Transvaal, September 23, 1902.

The constitutions granted under the prerogative can be of any type. But it was early the practice to accord to conquered and ceded colonies, *e.g.*, Grenada, St. Vincent, the islands ceded by France by the Treaty of Paris of 1763, the same type of constitution which it had to grant to settled colonies, including a legislature on the British model, a governor, nominated council, and elected assembly. The basis of the constitutions of Jamaica (1662—64), of the Canadian maritime colonies (if accepted as ceded), Nova Scotia (1758), Prince Edward Island (1773), and New Brunswick (1784), of the Cape of Good Hope (1851—53), of Natal (1856), of Malta in 1921, Southern Rhodesia in 1923, as of the Transvaal and the Orange River Colony in 1906—07, was that power.

On the other hand, after the American revolution, no such grants were usual. St. Lucia (1803) and Trinidad (1802), Mauritius (1810), Seychelles (1810), for instance, were given, no less than Ceylon (1802), strongly restricted constitutions.

The Crown cannot, however, make laws contrary to the fundamental principles of the British constitution, or exempting persons from the general laws of trade, or the authority of Parliament, or granting exclusive privileges to individuals (*a*), and, when a representative government has been granted to a colony, the Crown cannot legislate in future, unless it specially reserves the power to act, as in the case of Ceylon or Malta, in the letters patent granting their constitutions. This doctrine was finally established in 1938, but subject to the qualification that, if the representative government is revoked then the prerogative of legislation reverts to the Crown (*b*). Thus, when such a government had been promised in 1763—64 to Canada, the only way to alter the situation was by Act of Parliament, the Quebec Act, 1774; if it has been given, an Act alone can take it away, *e.g.*, Dominica Act, 1938, and the British Guiana Act, 1928.

It is not clear that a colony can absolutely extinguish its legislative power; in the cases where it has been done, *e.g.*, in Jamaica and Grenada and St. Vincent, the local legislation has to be confirmed by Imperial Acts (29 & 30 Vict. c. 12; 39 & 40 Vict. c. 47). On the other hand a legislature can change itself as opposed to extinction; thus, the Virgin Islands changed a bicameral representative constitution in 1854 for a single chamber with an elected majority, in 1859 the majority was reduced to parity with the non-elected members, and in 1867 a purely nominated body was created, which in 1902 gave all power to the governor of the Leeward Islands.

### *Classification of Colonies.*

At the present day, apart from the various protectorates and the mandated territories, there are thirty-two—to become thirty-three—colonies with distinct governments. The historical term "Crown colony," now officially replaced by "colony not possessing responsible

(*a*) See 20 St. Tr. p. 323. This *dictum* must now be restricted to cases of incompatibility with Imperial legislation applying to the colonies under 28 & 29 Vict. c. 63.

(*b*) *Campbell v. Hall*, *ubi supra*; *Bishop of Natal, In re* (1865), 3 Moo. P. C. (N. S.) 115, 152; *Sammut v. Strickland*, [1938] A. C. 678.

government," denotes a colony in which the administration is carried on by public officers under the control of the Secretary of State for the Colonies, as representing the Crown. Responsible government colonies are those in which the public officers are responsible to the lower house of the local legislature.

**Crown Colonies.**—The Crown colonies can be divided into groups according to the degree of independence of their legislatures:—

*Group I.* consists of seven colonies, in which the Crown has the sole power of legislation, which it exercises through a governor or high commissioner alone:

Gibraltar.

St. Helena (c).

Basutoland (d).

Ashanti (e).

Gilbert and Ellice Islands Colony (f).

Aden (since April 1, 1937).

In all of these the Crown has power to legislate by Order in Council. Gibraltar, by Letters Patent of September 12, 1922, Aden under the Aden Colony Order in Council, 1936 (authorised by the Government of India Act, 1935, s. 288, on separation from India), and St. Helena, with its dependencies, have executive councils. From Aden, appeals lie to the High Court of Bombay.

Cyprus, which possessed a legislature with an elected majority (three Muhammadan and twelve Greek members), under Letters Patent and Royal Instructions of March 10, 1925, was deprived of

(c) Ascension, under Admiralty control from 1815—1922, was by letters patent of September 12, 1922, made a dependency of St. Helena, and Tristan da Cunha, Gough, Nightingale, and Inaccessible Islands were made dependencies by Letters Patent of January 12, 1938.

(d) Basutoland was annexed to Cape Colony in 1871 (Cape of Good Hope Act, No. 12 of 1871), but was not made subject to the general laws of the colony, the governor of Cape Colony legislating for Basutoland by proclamation. It was disannexed in 1883 (Act No. 34), and the government is now administered by a resident commissioner, under the supervision of the High Commissioner for Basutoland, the latter having the power of legislation, under Order in Council of February 2, 1884. It was ceded by its chief to the Crown in 1868 (March 12).

(e) Ashanti was annexed by Order in Council, September 26, 1901, consequent upon the successes of the British arms in that year. It is now, therefore, a British colony, and by the same Order in Council, now replaced by the Ashanti Order in Council, November 9, 1934, and Royal Instructions, November 23, 1934, the government is administered by a chief commissioner, appointed by the governor of the Gold Coast, and a member of the executive council of the colony which serves also for Ashanti; the governor has the power of legislation by Ordinance, and under Order in Council of November 9, 1934, may deal in an Ordinance with the colony and Ashanti, and also the Northern Territories Protectorate, for which see p. 558, *post*.

(f) Annexed by Order in Council, November 10, 1915. Ocean, Fanning and Washington Islands were added to the colony in 1916 (Order in Council, January 27, 1916), and Christmas, Phoenix, and other Islands by Orders in Council, July 30, 1919, March 18, 1937; Canton and Enderbury Islands included in this Order have been claimed by the United States, but an amicable arrangement to allow mutual facilities for use as air stations has been made. It is administered by a resident commissioner and legislated for by Ordinance by the High Commissioner for the Western Pacific.

it in 1931 as a result of severe rioting, and legislative power vested in the governor alone (*g*). It has an executive council.

*Group II.* consists of five colonies in which there is a nominated legislative council, as well as an executive council, with whose aid respectively the governor legislates and administers—

Falkland Islands (four officials, four non-officials).

Gambia (six officials, four non-officials).

Hong Kong.

Seychelles (three officials, three non-officials, one of whom serves on the executive council).

The Straits Settlements (Singapore, Penang, Malacca and Labuan (*h*)).

In all these cases, the Crown can legislate by Order in Council, and there is a majority of officials, including the governor. In Hong Kong and the Straits an approach to election appears, as two of the eighteen members (governor, nine officials and eight unofficial) are representatives of the Chamber of Commerce and the justices of the peace in Hong Kong, and of the twenty-six members of the council in the Straits, two are chosen by the Chamber of Commerce at Singapore and Penang. They form thus a transition to the next class. In both colonies also there are three unofficial members of the executive council, two being also members of the legislative councils.

*Group III.*—In fifteen colonies the Crown has the control of administration and legislation, which it exercises through a governor or administrator, assisted by executive and legislative councils, the latter are composed of *ex officio* or official, or partly official and partly nominated, and elected members, the latter in a minority as against the other members with the governor:

Malta, whose history is related below, under Letters Patent of 1939 is given ten elected to eight official and two nominated members of the legislature.

Mauritius (ten elected, as opposed to eight *ex officio* and nine nominated under Letters Patent and Royal Instructions of 1913 and 1933).

Fiji (three *ex officio* members, thirteen officials, five Europeans and five Indians, three elected in either case, and five natives chosen from seven to ten persons nominated by the Great Council of Native Chiefs, under Letters Patent and Instructions, February 2, 1937.

British Honduras (*i*).

(*g*) Letters Patent, November 12, 1931. The island was annexed by Order in Council, November 5, 1914, after having been administered by agreement with Turkey from 1878—1914.

(*h*) Labuan was a separate colony from 1846 to 1907, when it was annexed to the Straits, becoming a distinct settlement from December 1, 1912.

(*i*) Originally unrecognised by the Crown, the people governed themselves by public meeting: Keith, *Const. Hist. First Brit. Emp.* pp. 172 f.; it was a colony by 1817: *Att.-Gen. for British Honduras v. Bristowe* (1880), 6 App. Cas. 143; in 1870 representative government, which had been established, was surrendered in favour of nomination; in 1892 an unofficial majority was conceded, and there is now a council of six official and seven unofficial members, five elected under Acts of 1935 and 1937,

Jamaica (*k*).

British Guiana (*l*).

The Leeward Islands (*m*).

Grenada

St. Lucia

St. Vincent

Trinidad and Tobago (*o*).

Sierra Leone.

The Gold Coast (fifteen official, six selected by the three provincial councils, being head chiefs; three elected by Accra, Cape Coast, and Sekondi municipalities; a mercantile member elected by the Chambers of Commerce, a mining member

men being eligible to vote at 21, women at 30 on a property franchise. The Governor is empowered to pass legislation over the head of the council in certain essential issues of public order, public faith, or other essentials of good government or financial equilibrium during the period of Imperial grants.

(*k*) Jamaica surrendered by Act in 1866 her representative constitution, and is now governed by Orders in Council of 1884, 1895, 1929 and 1935 under Imperial Act (29 & 30 Vict. c. 12). It has as dependencies (36 & 37 Vict. c. 6) Turks and Caicos Islands, under a commissioner and nominated legislative board under Jamaica Act No. 6 of 1926, and (26 & 27 Vict. c. 31) the Cayman Islands, under a commissioner and partly elected legislature (24 justices *ex officio* and 27 elected vestrymen). The colony has five *ex officio* members of council, ten nominated, and fourteen elected; any nine of these can block any new appropriation or tax, and all fourteen any other measure, unless the governor declares the matter of paramount importance, when the other votes can overrule. There is female suffrage with a property franchise.

(*l*) The constitution of this colony, based on that it had on cession in 1814, was revoked by Imperial Act (18 & 19 Geo. V. c. 5), and a new constitution given by Order in Council, July 13, 1928; Letters Patent, July 20, 1928. There are ten official, five nominated, and fourteen elected members, but the governor can secure any necessary legislation over the head of the legislature with the Secretary of State's approval.

(*m*) Under 34 & 35 Vict. c. 107, amended by local Acts from 1899—1935, and Letters Patent and Instructions of November 17, 1936, this is a federation of Antigua, Dominica, St. Christopher-Nevis, Montserrat and the Virgin Islands; the federation has defined powers; each island has a legislature now partly elective (Antigua, Dominica, St. Kitts-Nevis, three official, three nominated, five elected; Montserrat has two nominated and four elected). The Virgin Islands is legislated for by the governor. The nine elected members of the federal council are chosen by the local legislatures, and nine official members; one is nominated as a rule for the Virgin Islands and an official to match. Dominica is to be separated from January 1, 1940, under the Dominica Act, 1938 (1 & 2 Geo. VI. c. 10). The island has long enjoyed a certain autonomy: Cmd. 4383, pp. 20 ff. There is no discrimination against women.

(*n*) The group known as the Windward Islands geographically includes Barbados, and Trinidad and Tobago, which are now separate colonies. Grenada, St. Lucia, and St. Vincent were united under a governor and commander-in-chief by Letters Patent of March 17, 1885. Each island retains its own institutions, an administrator representing the governor-in-chief in St. Lucia and St. Vincent, and there is no common legislature or system of laws. A common Court of Appeal exists under 9 & 10 Geo. V. c. 47, for all these islands, British Guiana, and the Leeward Islands. The legislatures by Order in Council, October 27, 1936, were reconstituted with female suffrage and equality of elected and other members, part nominated, but the governor may enact legislation in the interests of public faith or good government (including imperial obligations and salary, &c. questions). The duration is three years. St. Lucia and St. Vincent have three official, three nominated and five elected members, and Grenada three official, four nominated and seven elected members. Elected members may be chosen to sit on the executive council.

(*o*) Tobago, a distinct colony, was annexed in 1889 under 50 & 51 Vict. c. 44, and made a ward under Order in Council, October 20, 1898. For elective members (seven against twelve official and six nominated), see Orders in Council, April 16, 1924; July 30, 1928; Letters Patent and Instructions, June 6, 1924. In the Windwards and Trinidad women may vote, but not be members.

elected by a Chamber of Mines, and three nominated Europeans, under Orders in Council of 1927, 1933 and 1934. Women are equalised with men politically.

Nigeria (formerly known as Lagos, and later Southern Nigeria (*p*)).  
Kenya Colony (*q*) (eleven official, nine nominated, eleven elected Europeans, five elected Indians, two nominated representatives of natives, a nominated Arab and an elected Arab).

In all these colonies, except British Honduras and the Leeward Islands, the Crown can legislate by Orders in Council. In British Honduras and Mauritius the governor has been given power to enact laws in certain cases. So also in Malta in 1939.

The governments of these colonies (Groups I.—III.) are constituted by means of three documents: (1) Letters patent under the Great Seal or Orders in Council constitute the office of governor, create the executive and legislative councils, and frame the constitution (*r*). (2) By commission under the sign manual and signet the governor is appointed. (3) Instructions under the sign manual and signet or through the Secretary of State detail the procedure of the executive and legislative councils, reserve certain subjects on which legislation cannot take place without the sanction of the Crown in Council, and define the relations of the governor and the judiciary. Those of the next group are likewise constituted, save as regards the Assemblies.

**Group IV.—Colonies with Representative Governments.**—This comprises three colonies to which representative legislatures have been granted, the Crown retaining only the right of veto, but controlling the public officers. The legislature consists of the governor and two chambers, a legislative council nominated by the Crown, and an elected legislative Assembly. The three colonies are:—

The Bahamas (nine legislative council, twenty-nine House of Assembly elected for fifteen divisions, under Acts of 1901, 1915 and 1937).

Barbados (nine legislative council, twenty-four Assembly, with maximum duration of two years, under Acts of 1928 and 1933).

(*p*) By Orders in Council of November 21, 1922, and February 6, 1928, there is a legislative council which legislates for the colony and the southern provinces of the Protectorate. The legislative council consists of the governor, up to thirty official members, three elected members representing the municipal area of Lagos, one elected member representing Calabar, and up to fifteen nominated unofficial members. The governor continues to legislate—not tax—for the northern provinces. See *post*, p. 557.

(*q*) Formerly the East Africa Protectorate, annexed by Order in Council, June 11, 1920. See Letters Patent, September 11, 1920, March 29, 1934; Royal Instructions, 1934. The colony is presumably one by cession or conquest, but, if not, the legislature could be set up by the British Settlements Act, 1887, and the Kenya Colony Order in Council, 1901 (S. R. & O., No. 1135, p. 475) refers to the Act of 1887 as its authority.

(*r*) The authority for the letters patent is either the prerogative which applies as regards the executive power in all cases; or (1) the legislative power in the case of conquered and ceded colonies; (2) local legislation in the case of British Honduras, the several colonies of the Leeward Islands (Antigua, Dominica, St. Christopher-Nevis, Montserrat, Virgin Islands); or (3) Imperial legislation, the British Settlements Act, 1887, and the special Acts for Jamaica, British Guiana, Malta, St. Vincent and Grenada (39 & 40 Vict. c. 47), and St. Helena (3 & 4 Will. IV. c. 85, s. 112). In the latter cases Orders in Council are usually used. For the Straits, see 29 & 30 Vict. c. 115; for Dominica, 1 & 2 Geo. VI. c. 10; for Aden, 26 Geo. V. & 1 Edw. VIII. c. 2, s. 288.

Bermudas or Somers Island (nine legislative council, thirty-six Assembly with maximum duration of five years, under Acts of 1928 and 1933);

and in these the Crown cannot legislate by Order in Council.

**Colonies possessing Responsible Government.**—*Malta up to 1936.*—By Letters Patent of April 14, 1921, Malta received in local as opposed to Imperial issues a full system of responsible government, with a Ministry, Senate, and Assembly, the Senate being mainly elective, and deadlocks being removed by joint sessions. Imperial matters, including defence, external trade, aliens, coinage, immigration, &c., were legislated for by the governor, who for executive purposes had a nominated council, which discussed with the executive council issues affecting local and Imperial interests. The constitution was suspended in 1930 owing to clerical interference with the freedom of election, but restored by Imperial Act in 1932, which approved certain modifications in the constitution already made by letters patent, assuring a more prominent place in education to English and Maltese. Owing to repeated defiance of the constitution and financial extravagance, the whole control of the government was assumed by the governor on November 3, 1933, and in 1936 (by Imperial Act) the whole of the old constitution of 1921 was revoked (*t*). English and Maltese are now alone official languages, Italian having been deprived of that status as a result of the disloyalty in 1935—36 of many Maltese of Italian origin. The constitution of 1939 is noted above.

*Southern Rhodesia*, under the control of the British South Africa Company from 1889 to 1923, was given responsible government with six ministers, the chief since 1933 being styled Prime Minister, by Letters Patent of September 1, 1923, having been annexed to the Crown. It is under the control of the Dominions Secretary, while Malta and Ceylon have always been under the Colonial Secretary. The colony has only an assembly of thirty members, all of whom since 1938 sit for single-member constituencies, with a moderate franchise, open to women and natives. But it may create a council. The only reservations of power concern native affairs, over which through the High Commissioner for Basutoland, Bechuanaland Protectorate, and Swaziland, the Crown retained control, and originally there were safeguards (now revoked) for the company's mineral rights and railway interests. The former have been purchased, and the latter provided for by establishing a tribunal to control rates. The colony applied in 1936 for the surrender of almost all control of native policy and its exercise by the British Government direct, not through the High Commissioner. This was conceded by Letters Patent and Instructions of March 25, 1937, the precaution being taken to create a Board of Trustees with a chairman selected by the Dominions Secretary, the chief justice, and the chief native commissioner, furnished with a certain measure of power to safeguard natives. On January 24, 1936,

(*t*) Malta Constitution Act, 1932 (22 & 23 Geo. V. c. 43); Malta (Letters Patent) Act, 1936 (26 Geo. V. & 1 Edw. VIII. c. 29); Letters Patent, August 12, 1936.

representatives of Southern and Northern Rhodesia claimed the union of the territories with full self-government: this claim is plainly excessive, and to grant it would injure the natives. In matters of trade the colony is treated almost on the footing of a dominion, being represented at Ottawa in 1932; its interests are specially safeguarded at the Imperial Conference, and its representative in London has the status of a high commissioner. The Crown retains a restricted constituent power.

*Ceylon* has a unique system of government, without an executive council, the Council of State (fifty elected members, three officers of state and eight nominated) having both executive and legislative functions. The former it carries out through seven committees, headed by elected chairmen who are the Board of Ministers, and are collectively responsible for the budget, and who are aided by the officers of state, chief secretary, legal secretary and financial secretary, who have further special departments under their control. The governor has general responsibility for approving action determined on by the council; he may legislate over its head in emergency, and assume charge of any department, and the position of the civil service is safeguarded and placed under his final authority. The colony, however, enjoys general freedom except in issues of defence, external policy and relations (*u*), and, rather unexpectedly, of fiscal policy, the British Government having insisted on penalising competitive Japanese imports in the interests of British exporters. This policy has raised grave dissatisfaction locally, as the poverty of the inhabitants renders purchase of British goods a serious hardship. In 1938—39 energetic demands for responsible government were taken into serious consideration by the Colonial Secretary. It is clearly desirable, for "the Cabinet system is necessary in order to fix and develop government responsibility, to render possible the emergence of political parties, and so to infuse discipline into democracy."

These legislatures are not *per se* endowed with the privileges of the British Parliament (*v*).

**Imperial Legislation for the Colonies.**—Every colony, whether a Crown colony or not, is subject to the paramount authority of the Imperial Parliament (*x*). Examples of the exercise of this power are to be found in the suspension of the Canadian constitution on two occasions (*y*), the abolition of slavery (*z*), the remodelling the British

(*u*) Ceylon (State Council) Order in Council, 1931 (amended March 22, 1934; May 4, 1935; November 23, 1937); (State Council Elections) Orders, 1931; March 22, 1934; August 13, December 20, 1935; Letters Patent, and Instructions, April 22, 1931. See especially the Governor's despatch, June 13, 1938; Cmd. 5910.

(*v*) *Doyle v. Falconer* (1866), L. R. 1 P. C. 328. In the case of Malta, Ceylon, and Southern Rhodesia, power to take privileges not exceeding those of the House of Commons from time to time is given in the constitution, and was exercised in Malta and Southern Rhodesia. A limited measure was accepted in Ceylon to allow control of the presence of strangers in the legislative chamber.

(*x*) See, as to conquered colonies, *per Lord Mansfield in Campbell v. Hall* (1774), 20 St. Tr. pp. 322 ff.; and this applies to all colonies; see 28 & 29 Vict. c. 63. As to the Dominions since 1931, see p. 496, *ante*.

(*y*) See 1 & 2 Vict. c. 9, and 2 & 3 Vict. c. 53.

(*z*) 3 & 4 Will. IV. c. 73.

Guiana Constitution in 1928, and the Malta (Letters Patent) Act, 1936. Normally such legislation deals with Imperial topics, such as the Army and Air Force, and the Navy, air navigation, carriage of goods by air, admiralty jurisdiction (*a*), copyright, nationality and naturalisation, currency, official secrets, the effect of, and Imperial co-operation in respect of, bankruptcy, extradition, fugitive offenders, colonial prisoners removal, international treaties of all kinds, foreign enlistment, merchant shipping, control of seal fisheries, the whaling industry, territorial waters jurisdiction, slavery and the slave trade, evidence, reciprocity in enforcement of judgments, &c.

**Colonial Legislative Powers.**—A colonial legislature is not a delegate of the Imperial Parliament even if created by it (*b*); it has plenary power in its sphere and can choose its own means of action, and can confer on executive officials powers of making regulations, which are valid if consonant with the power given (*c*). Their power is limited in general *territorially* to the colony and its territorial waters, but in many cases extra-territorial powers are given by Imperial Acts, as in the case of defence (*d*), and merchant shipping as regards registered shipping and the coasting trade (*e*), and their Courts enjoy admiralty jurisdiction.

An essential second restriction of power is that of *repugnancy*. Originally any law might be impugned as contrary to English common law principles or statute; this criterion was uncertain and difficult to apply; it caused much trouble in South Australia and a remedy was provided by extending colonial powers.

The validity or otherwise of colonial law is regulated by the Act to Remove Doubts as to the Validity of Colonial Laws, 1865 (*f*), which enacts that "any colonial law which is, or shall be, in any respect repugnant to the provisions of any Act of Parliament extending to the colony, to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force or effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative" (*g*). The same rule applies to Orders in Council issued under the prerogative for conquered colonies (*h*).

**Colonial Constituent Powers.**—By the same Act every colonial legislature shall have, and be deemed at all times to have had, power to establish or abolish and reconstitute Courts of justice within the

(*a*) 53 & 54 Vict. c. 27.

(*b*) *R. v. Burah* (1878), 3 App. Cas. 889 (India); *Powell v. Apollo Candle Co.* (1885), 10 App. Cas. 282 (New South Wales); *Hodge v. R.* (1883), 9 App. Cas. 117 (Ontario).

(*c*) *Hodge v. R.*, *ubi supra*.

(*d*) Army Act, s. 177; Air Force Act, s. 177; Colonial Naval Defence Act, 1931.

(*e*) Merchant Shipping Act, 1894, ss. 735, 736.

(*f*) 28 & 29 Vict. c. 63. For the genesis, see Keith, *Responsible Government in the Dominions* (ed. 1912), i, 400—408, 1243 ff.

(*g*) *Ib.* s. 2. Repugnancy to common law is abolished by s. 3.

(*h*) *Ib.* s. 1. Cf. *Globe Advertising Co. v. Johannesburg Town Council* (1903), T. S. 335.

colony; and every representative legislature (*i*) shall have, and be deemed at all times to have had, power to make laws respecting the constitution, powers, and procedure of such legislature, provided such laws are passed in such manner and form as is from time to time required by any Act of Parliament, Letters Patent, Order in Council, or colonial law in force in the colony (*k*). This still applies to the Australian states, New Zealand, Newfoundland, Southern Rhodesia, Bahamas, Barbados, Bermuda, and Ceylon. In other colonies no power exists unless (1) through express grant, as in British Guiana, under the 1928 constitution, and the Leeward Islands federation, under the statute of 1871 creating it, which requires reservation of any bill to this end, or (2) by derivation from a legislature formerly representative, as in British Honduras and the islands in the Leewards which once were colonies. Under the constitutions of 1936, the islands of the Windward group may, perhaps, also claim constituent power, as inherent in their representative character.

### *Colonial Governors.*

**Constitutional Position.**—Colonial governors are appointed by commission from the Crown, and their powers are limited and defined by the letters patent which constitute the office of governor, and by the instructions which are given to them on appointment, under which obedience to local law is expressly emphasized. The extent of delegation to him of the executive power, which, as in the United Kingdom, belongs to the King by his prerogative, is never defined in those instruments, though they deal with many points, such as removal and appointment of officers, assent to laws, and pardon. What is clear is that a governor has a delegation of all powers essential for local government, but not of all prerogatives (*l*). His power is also in great measure statutory, superseding as in England the prerogative in certain cases (*m*). His exercise of his powers is essentially subordinate to the directions, general and special, of the Secretary of State for the Colonies acting for the Crown, whose sanction he must obtain for any new policy and to whom he constantly reports by telegram and despatch; estimates of revenue and expenditure must be approved, the degree of control varying with (1) the type of constitution, and (2) the state of finances; if the colony receives a grant in aid from Imperial funds close control is exercised by the request of the Treasury.

(*i*) The term "representative legislature" includes all colonial legislatures, which shall comprise a legislative body of which one-half are elected by inhabitants of the colony: *ib.* s. 1. (*k*) 28 & 29 Vict. c. 63, s. 5.

(*l*) Thus it seems that a governor may not, save with express delegation from the Crown, authorise an "act of State," in the technical sense of an act in itself illegal done by a British subject against an alien outside British dominions, which, if ratified or authorised by the Crown, cannot be the subject of legal proceedings in English Courts: *Buron v. Denman* (1848), 2 Ex. 167; *R. v. Crewe*; *Sekgome, Ex parte*, [1910] 2 K. B. 576; *Sobhuza II. v. Miller and the Swaziland Corporation*, [1926] A. C. 518. See *Musgrave v. Pulido* (1879), 5 App. Cas. 102; it is the duty of every British Court to investigate official acts and to examine the validity of plea of "act of State": *Eshugbayi Eleko v. Nigerian Government*, [1931] A. C. 662. Cf. p. 39.

(*m*) Cf. *Att.-Gen. v. De Keyser's Royal Hotel*, [1920] A. C. p. 561, and p. 208, *ante*.

In a self-governing colony, on the other hand, the governor takes the place of a constitutional monarch, and must act on the advice of his ministers on all internal issues, unless he can secure others to replace them if they resign office as the result of his refusal of advice. An example of this occurred in New Zealand in 1892, when the nominated upper chamber continually refused to support the measures of a Premier with a large Parliamentary majority. The Ministry demanded an increase in the numbers of the upper house sufficient to give the government a stronger position there. This the governor refused, but on application to the Colonial Office he was instructed that where no Imperial interests were at stake, and where the constituencies were at one with the Ministry, he must accept the advice of his ministers. Where Imperial interests are involved (*e.g.*, defence or foreign relations), the governor must obey the directions of the Crown, and, if he cannot obtain a ministry willing to support his action, must rely on Imperial aid; in Malta and Ceylon, however, external affairs and defence were made concerns of the governor, not of ministers. As mentioned above, the governor of Malta in November, 1933, had to dismiss ministers for violating the constitution, just as in New South Wales, in 1932, the governor had to dismiss Mr. Lang for violating the law of the Commonwealth.

**Executive Councils.**—The governor exercises, with the advice of his council, the executive powers conferred upon him by the Crown or by law, which in some cases imposes duties on the governor in council. The members of the executive council, in colonies which have not responsible government, are appointed from amongst the principal officers of the colony, sometimes with unofficial members, by virtue of the governor's instructions, or by warrant from the Crown on the advice of the Secretary of State. They can be dismissed only by the Crown, the governor having, however, a power of suspension. They are usually appointed by letters patent under the colonial seal. It is not rare now to appoint for a fixed time, with possibility of re-appointment.

In a colony with responsible government, the governor personally appoints or removes members of the executive council, who are at the same time the ministers in charge of the important departments and hold office at his pleasure, in effect so long as they enjoy the confidence of the lower chamber. The Ministry, like the British Cabinet, confers in the absence of the governor, who, however, in Southern Rhodesia—at present the only such colony—presides at the formal meetings of the executive council to pass Orders in Council and to transact other business. In Ceylon there is no executive council, but the Board of Ministers, within their functions, act as a cabinet. But the governor deals direct with the officers of state in matters under them.

**The Civil Service.**—As the result of discussions of a special committee appointed in 1930, various unified branches of the civil service have been established, *viz.*, Colonial Administrative Service (1932), legal service (1933), agricultural service (1935), forest service (1935),

veterinary service (1935), and police service (1936). They are recruited by the Director of Recruitment or the Crown Agents. The retiring age varies: fifty in West, fifty-five in East Africa. There are educational openings, and the Crown Agents recruit engineers of all kinds, officers for marine services, railway officers, accountants, policemen, and many others.

**The Governor's Powers and Duties.**—The governor's powers and duties are mainly as follows:—

- (1) He pardons or respites criminals, and remits fines or penalties due to the Crown. In capital cases in Southern Rhodesia he must exercise a personal discretion; in other cases he may act on a minister's advice.
- (2) Money for the public service is issued under his warrant; in Southern Rhodesia he acts on ministerial advice, and usually so in Ceylon.
- (3) He issues writs for the election of members, and convokes, prorogues, and dissolves legislative assemblies. In Southern Rhodesia he acts normally on advice. In Ceylon he must dissolve on rejection of the annual appropriation bill or if the council of state indicates loss of confidence in the Board of Ministers.
- (4) He appoints absolutely, conditionally, or provisionally to offices in the colony. Where there is a responsible government these appointments are made with the advice of the Ministry.
- (5) In colonies with responsible government he can suspend or dismiss public servants holding office during pleasure (*n*). But it is recognised that he acts on the advice of the Ministry. In other colonies his powers of suspension or dismissal are subject to regulations made by the Colonial Secretary.
- (6) In all colonies his consent is necessary to the enactment of colonial laws. The governor may adopt one of four courses: (1) he may assent; (2) he may withhold his assent altogether, but this is rare; (3) he may assent if the law contains a clause suspending the operation of the bill until it has been confirmed by the Crown; further, in Ceylon he may assent but himself defer for six months the operation of the law; (4) he may reserve the bill for the Crown's assent. In the case of bills concerning any grant to himself, the army or air force, the navy, differential duties, treaties, currency, divorce, trade and shipping, the royal prerogative, or the rights of subjects not within the colony, or differential treatment of different classes of British subjects, and sometimes in other cases also, he must adopt course (3) or (4), unless, of course, he has obtained authority to assent or refuse assent.

The Crown may disallow any law which the governor has signed in assent either at any time, or within a certain time

(*n*) See *Robertson, Ex parte* (1858), 11 Moo. P. C. 288. The procedure of amotion by governor and council under Burke's Act (22 Geo. III. c. 75) applies only properly to officers holding by patent during good behaviour. Cf. *Willis v. Gipps* (1846), 5 Moo. P. C. 379. It is practically obsolete.

of the receipt of the Act by the Colonial Secretary from the governor. One year only is allowed in the case of Southern Rhodesia, two for Ceylon. The royal assent to a reserved bill can usually be given at any time, but only within a year in Southern Rhodesia.

- (7) He issues marriage licences, letters of administration, and grants probates, unless other regulations are made by local law or charter of justice, as is now regularly the case.

He used to present to benefices of the Church of England in the colony, but this is practically obsolete.

- (8) It is his duty to repel aggression, and suppress riot, rebellion, or piracy. In Gibraltar, Malta and Bermuda he also commands as an Imperial general officer, the Imperial troops, and in this capacity reports to the Secretary of State for War, but on defence in relation to civil issues to the Colonial Office. He makes reports to the home authorities on the condition of the local forces, which are not under Army Council control. The King's African Rifles and the Royal West African Frontier Force, which are raised in the East and West African colonies and protectorates, are trained on regular army models and commanded by officers seconded from the regular army. The forces in the West Indian colonies are usually inspected by the officer commanding the Imperial forces in Jamaica; those in Ceylon, Hong Kong, and Malaya by the officers there commanding. In certain cases (Kenya and Malaya especially) service in local volunteer forces is compulsory in certain conditions.

In other colonies where British forces are provided (Ceylon, Mauritius, Straits Settlements, Hong Kong, Jamaica, and Cyprus), he has no direct authority over the troops, but is entitled to the aid of the officer commanding (who is placed on the executive council) to maintain order. Where naval bases are maintained (Malta, Gibraltar, Bermuda, Ceylon, Singapore and Hong Kong), his position to the naval command is analogous. In like manner he can apply to naval officers near colonial waters for aid in emergency, reporting, of course, by telegram to the Colonial Secretary.

- (9) As in effect the government of a colony, it rests with him, on the instructions of the Secretary of State, to put into effect the powers of the government under the Colonial Naval Defence Act, 1931 (21 Geo. V. c. 9), to place at the disposal of the Admiralty the services of ships or men raised by the colony under that Act which gives extra-territorial force to legislation of the colony. Orders in Council have been issued for Kenya (1932), Ceylon, the Straits Settlements, Sierra Leone, Gold Coast, and the Gambia.
- (10) In colonies without representative governments he generally initiates legislation, and he initiates all taxation and appropriation bills (c).

(c) In Southern Rhodesia, as in the British Parliament, he formally recommends bills. In Ceylon (Ceylon State Council)

- (11) He administers the Foreign Enlistment Act, 1870, Extradition Acts, 1870—1935, and the Fugitive Offenders Act, 1881, which extend to the colonies.
- (12) He exercises in the colony the jurisdiction conferred by the British Nationality and Status of Aliens Act, 1914, as to naturalisation, but subject to the confirmation of the Secretary of State for Home Affairs.
- (13) He may not leave the colony without permission, or receive or give presents, or act as an agent in forwarding them to the Crown.
- (14) He confirms the findings of courts-martial when in command of the military forces, or in the absence of any superior authority.

He may proclaim any military forces in the colony subject to the Army Act.

- (15) He appoints to vacancies in the Vice-Admiralty Court (if any) of the colony, and in cases where no vice-admiral has been formally appointed, he is an *ex-officio* vice-admiral.
- (16) His duty is to co-operate with the governors of adjacent colonies in matters of common interest. But, in addition, in East Africa there is, since 1926, a standing East Africa Governors' Conference, with a secretariat at Nairobi; each year the governors of Kenya, Uganda and Tanganyika Territory meet, and may be joined by the governors of Northern Rhodesia and Nyasaland, and the British Resident, Zanzibar.

General conferences of colonial governors were held in London in 1927 and 1930.

**The Liability of Colonial Governors and Officials.—Civil Liability.** A colonial governor is liable to a civil action for acts done in his private and unofficial capacity both in the Courts of the colony (*p*) and in the Court of King's Bench in England (*q*). He may be sued in England for acts done in his official capacity, but outside the limits of his authority (*r*), or for acts which, though done officially and apparently within the limits of his commission, are such as the Sovereign through his ministers cannot legally do, for the orders of the Crown are no excuse for such acts. But it is necessary under English law that the action impugned should be tortious both in the view of English law and of local law, and action can be barred, therefore, if the local legislature legalises the measures impugned. Nor is it illegal or unconstitutional for a governor to assent to an act indemnifying himself for illegal measures taken in suppressing revolt (*s*). On the

Order in Council, 1931, s. 57), the responsibility rests with the Board of Ministers. In Bahamas and Bermuda private members can propose money votes; in Barbados this right by local law is in abeyance; the estimates are prepared, money votes proposed, and all government measures introduced by an Executive Committee comprising the executive council, one member of the legislative council and four members of the assembly nominated by the governor.

(*p*) *Hill v. Bigge* (1841), 3 Moo. P. C. 465.

(*q*) *Cameron v. Kyte* (1835), 3 Knapp. 332.

(*r*) *Mostyn v. Fabrigas* (1774), 1 Cowp. 161; *Musgrave v. Pulido* (1879), 5 App. Cas. 111; *Phillips v. Eyre* (1869), L. R. 4 Q. B. 225; (1870), 6 Q. B. 1.

(*s*) *Phillips v. Eyre*, *ubi sup.*; Dicey and Keith, *Conflict of Laws*, pp. 784, 786.

strength of the immunity from suit formerly enjoyed by the Lord Lieutenant of Ireland as a viceroy as representing the Crown (*t*), it has been suggested that he cannot be sued in his colony for acts done in his official capacity, but this has been rejected by the Privy Council (*u*). It is clear, however, that he cannot be sued either in the colony or in England for official acts of state, *i.e.*, acts of government, provided that they are (1) within the authority of his commission, and (2) acts which the Crown can legally do. In cases of contract on behalf of the government the only remedy is by Petition of Right, unless other provision is made by legislation (*x*). Other officials are in like condition (*y*). It may be noted that in the mandated territories of Palestine and Tanganyika the head of the government is rendered immune from suit.

*Criminal Liability.*—Governors are liable to criminal proceedings in the Court of King's Bench in England under the Governors' Act (*z*) "for acts of oppression within the area of their command, or for any other crime or offence contrary to the laws of the realm or in force within their respective governments or commands" (*a*). Whether a governor can be tried on a criminal charge in his own colony has not been judicially determined, as he is not a viceroy (*b*), but only an officer with limited authority (*c*), and as in 1773 the Regulating Act left the Governor-General of Bengal subject to the jurisdiction of the Supreme Court in treason or felony, it seems that he could not claim exemption from a criminal prosecution any more than a Cabinet Minister in England could do so. It may be noted that in the Government of India Act, 1935 (s. 306), and the Government of Burma Act, 1935 (s. 152), complete immunity from all process is given to the governor-general and governors, and also to the Secretary of State during office; the mention of the last-named is explained by the fact that there had existed liability by statute of the Secretary of State in Council. They are still subject to the Imperial Acts. Against this must be set the public inconvenience which would arise if a governor were subject to arrest like any ordinary person, and under the old law of execution, though he could be sued for debt, his person,

(*t*) *Tandy v. The Earl of Westmoreland* (1800), 27 St. Tr. 1246; *Luby v. Lord Wodehouse* (1865), 17 Ir. C. L. R. 618; *Sullivan v. Spencer* (1872), Ir. R. 6 C. L. 173.

(*u*) *Musgrave v. Pulido* (1879), 5 App. Cas. 102, 107.

(*x*) *Macbeath v. Haldimand* (1786), 1 T. R. 172. So as regards alleged contracts with public servants, action cannot lie on breach of warranty to employ: *Dunn v. Macdonald*, [1897] 1 Q. B. 555; *Kenny v. Cosgrave*, [1926] Ir. R. 517.

(*y*) An officer, it must be remembered, is only responsible in tort for his own acts; he can neither plead orders of a superior as justification, nor is he responsible for subordinates unless acting on his instructions; cf. p. 35, *ante*.

(*z*) 11 & 12 Will. III. c. 12; cf. 42 Geo. III. c. 85.

(*a*) There seems to be some doubt whether this Act extends to felonies. See *R. v. Shawe* (1816), 5 M. & S. p. 405; but cf. *R. v. Eyre* (1868), L. R. 3 Q. B. 487. In 1802 Governor Wall was tried at the Old Bailey for the murder of a soldier by flogging whilst governor of the Island of Goree, sentenced to death and executed: 28 St. Tr. 51. The 33 Hen. VIII. c. 23, under which the trial took place, was repealed by the 9 Geo. IV. c. 31, s. 1; 9 Geo. IV. c. 74, s. 12; but the principle of trial in England of murder or manslaughter overseas is maintained in 24 & 25 Vict. c. 100, s. 9.

(*b*) See *Hill v. Bigge* (1841), 3 Moo. C. P. pp. 476 ff., disapproving the *dictum* of Lord Mansfield to the contrary in *Fabrigas v. Mostyn* (1773), 20 St. Tr. 81.

(*c*) *Cameron v. Kyte* (1835), 3 Knapp. P. C. 332.

it seems, could not be taken in execution under a writ of *capias* (*d*). The Governors' Act (*e*) was extended by a subsequent Act (*f*) to "all persons in His Majesty's service, in any civil or military capacity out of Great Britain, guilty of any crime, misdemeanour, or offence, in the execution of, or under the colour or in the exercise of, any such employment." But this Act has been held not to extend to felonies (*g*). Breaches of official trust committed out of the United Kingdom are within the Act, and may be tried either in the place where they were committed or in England (*h*), and the corrupt communication of information acquired while acting in any official capacity under His Majesty is a breach of official trust (*i*).

Capricious and indiscreet use of their powers by colonial officers other than governors may also be restrained through the exercise of the power of suspension vested in the governor (*k*).

**Claims against the Crown.**—In certain cases provision is made by the local legislature for a simple procedure in lieu of the King's fiat to a petition of right in cases of contractual claims against the Crown. More important is the fact that in some cases liability is accepted in tort (*l*), while in others there has grown up irregularly the practice of direct suit against the Government, as in Scotland (*m*). In Australia the Commonwealth and the states are, under the Constitution and the Commonwealth Judiciary Act, liable to suit in tort, without further legislation, and can sue each other therein.

**The Judiciary.**—The highest Court in each is usually a Supreme Court which controls the subordinate jurisdictions, among which in colonies with native populations are often forms of native tribunals. The tenure of office is now normally at pleasure, but care is taken to secure that no judge is dismissed without full cause, the issue being referred for the advice of the Privy Council (reinforced if desired by the Colonial Secretary or Lord President) after suspension by the Governor (*n*).

**Appeals from the Colonies, Dominions, &c. (o).**—From the highest civil or criminal Court in any colony appeal lies to the King in Council,

(*d*) See *Hill v. Bigge* (1841), 3 Moo. P. C. p. 478.

(*e*) 11 & 12 Will. III. c. 12.

(*f*) 42 Geo. III. c. 85.

(*g*) See *R. v. Shawe* (1816), 5 M. & S. p. 405. The judgment of Lord Ellenborough, C.J., that the word "crime" in the Act does not extend to felonies chiefly on the ground that the method of procedure provided by the Act (viz., criminal information exhibited by the attorney-general) does not apply to felonies, does not seem entirely satisfactory, seeing that the Act provides for prosecution by information or indictment.

(*h*) 1 & 2 Geo. V. c. 28, s. 10 (2).

(*i*) 1 & 2 Geo. V. c. 28, s. 2; 10 & 11 Geo. V. c. 75.

(*k*) See *Cloete v. R.* (1854), 8 Moo. P. C. 484.

(*l*) *Att.-Gen. for Straits Settlements v. Wemyss* (1888), 13 App. Cas. 192. For Canada, see Exchequer Court Act (R. S. C., 1927, c. 34); *Capon v. R.*, [1933] Ex. C. R. 54. For South Australia, *Robinson v. South Australia State*, [1929] A. C. 469. For South Africa, the Crown Liabilities Act, 1910 (No. 1). For the Commonwealth, see *Commonwealth v. New South Wales* (1923), 33 Commonwealth L. R. 1.

(*m*) *Hettihewage Simon Appu v. Queen's Advocate* (1884), 9 App. Cas. 571 (Ceylon). So in Mauritius, Fiji, &c.

(*n*) *Mr. J. B. Walker, In re*, The Times, December 10, 1908.

(*o*) It is convenient to treat all appeals together, including those from protectorates and mandated territories.

and since 1833 (*p*) these appeals are heard by the Judicial Committee of the Privy Council. The right of the Crown to admit appeals originally rested on prerogative, but by the Judicial Committee Act, 1844 (*q*), it became statutory, and is regulated normally by Order in Council, but in certain cases (*r*) by local Act. The right to appeal is usually limited, by Order in Council or local legislation, to cases in which leave to appeal has been granted locally according to the rules in force in the colony, which, since the revision of the rules undertaken in 1907, generally include a power at the discretion of the Court to admit appeals not normally within the rules (*s*). In all cases, however, the Crown retains the right to grant *special leave* to appeal, unless that right has expressly been taken away by Imperial legislation in precise words, which has been done only in the case of certain appeals from the High Court of the Commonwealth of Australia (*t*), and from all inferior Courts in the Union of South Africa (*u*). Power, further, to limit appeals from the High Court and the Appellate Division of the Supreme Court of the Union is given, and under the Statute of Westminster, 1931 (*x*), power to eliminate the appeal is given to all the Dominions (*y*); under it Canada abolished the criminal appeal (including appeals from penalties under provincial statutes) in 1933 and the Irish Free State all appeals. Apart from the power given in 1931, an Act of the Canadian Dominion (*z*), which declared the judgment of the Canadian Court of Appeal in insolvency questions to be final, was held not to interfere with the prerogative of the Crown to grant special leave to appeal (*a*). So, despite an early attempt by Canada to abolish criminal appeals, it was ruled that the royal prerogative to grant special leave to appeal in any case could not be excluded except by an Imperial statute (*b*).

**Privy Council Practice.**—In criminal suits the Privy Council will not grant special leave to appeal “unless some substantial or grave injustice has been done through disregard of the forms of legal process, or some violation of the principles of natural justice” (*c*), or unless

(*p*) 3 & 4 Will. IV. c. 41.

(*q*) 7 & 8 Vict. c. 69, s. 1.

(*r*) Channel Islands, Isle of Man, Bermuda, British Honduras, Falkland Islands, Leeward Islands, Ceylon (in part), Straits Settlements (*Commr. of Stamps v. Oei Tjong Swan*, [1933] A. C. 378), Ontario, Quebec; and under the Letters Patent of the Indian High Courts and from the Federal Court by 26 Geo. V. & 1 Edw. VIII. c. 2, ss. 208, 212, 320.

(*s*) As to the rules in force in the various Dominions and colonies, see Bentwich's Privy Council Practice (3rd ed.), pp. 21—102.

(*t*) Commonwealth of Australia (Constitution) Act, 1900, Const. s. 74.

(*u*) South Africa Act, 1909, s. 106.

(*x*) 22 Geo. V. c. 4, s. 2.

(*y*) For the Irish Free State, see p. 515, *ante*.

(*z*) 40 Vict. c. 41, s. 28 (Canadian Act).

(*a*) *Cushing v. Dupuy* (1880), 5 App. Cas. 409, overruling *Cuivillier v. Aylwin* (1832), 2 Knapp, 72.

(*b*) *Nadan v. R.*, [1926] A. C. 482.

(*c*) *Falkland Islands Co. v. R.* (1863), 1 Moo. P. C. (N. S.) 299; *Re Dillet* (1887), 12 App. Cas. 459; *Deeming, Ex parte*, [1892] A. C. 422; *Dal Singh v. King-Emperor*, 44 Ind. App. 137; *Clifford v. R.* (1914), 83 L. J. P. C. 152; *Ibrahim v. R.*, [1914] A. C. 599; *Mohindar Singh v. King-Emperor* (1932), L. R. 59 Ind. App. 233; *Sutton v. R.*, [1933] A. C. 348; *Sheo Swarup v. King-Emperor* (1934), L. R. 61 Ind. App. 398; *Renouf v. Att.-Gen. for Jersey*, [1936] A. C. 445.

the question raised is of grave importance (*d*). The rule is not to grant leave in criminal cases except where some clear departure from the requirements of justice is alleged to have taken place (*e*). And in civil suits, where the issue in dispute is a question of fact only, the Judicial Committee of the Privy Council will not entertain an appeal (*f*), and special leave to appeal from the Supreme Court of Canada (*g*) will be refused unless the case is of gravity, involving matters of public interest, or some important question of law, or affecting property of considerable amount, or where the case is otherwise of public importance (*h*). The same rule applies with greater strength to unitary constitutions such as the Union (*i*) and prior to the legislation of 1933, the Irish Free State (*k*). Moreover, election petitions will not be dealt with (*l*), nor appeals from special tribunals exercising discretionary authority (*m*), nor from martial law sentences (*n*). By special leave under statute appeals can be allowed from inferior Courts; the only normal case is that of the Supreme Court of New Zealand (*o*). Where the Court below refuses leave wrongly, or has no power to grant leave, special leave may be asked for from the Privy Council (*p*). Apart from appeals, the Privy Council may decide justiciable issues on special reference under s. 4 of the Judicial Committee Act, 1833.

The Judicial Committee has no power to inquire into the propriety or impropriety, as opposed to the legal validity, of a colonial statute (*q*).

(*d*) *R. v. Bertrand* (1867), L. R. 1 P. C. 520. Cf. on principles, *Nazir Ahmed v. King-Emperor* (1936), 30 Cox, C. C. 359.

(*e*) *Riel v. R.*, 10 App. Cas. 675. For cases of important appeal, see *Lanier v. R.*, [1914] A. C. 221 (Seychelles); *Knowles v. R.*, [1930] A. C. 366 (Gold Coast) *New Zealand Crown Milling Co. v. R.*, The Times, January 28, 1927; *Lawrence v. R.*, [1933] A. C. 699; *Ras Behari Lal v. King-Emperor* (1933), L. R. 60 Ind. App. 354; *Chandrasekhara v. R.*, [1937] A. C. 220; *Seneviratne v. R.* (1936), 3 All E. R. 36. But see *Attygalle v. R.*, [1936] A. C. 338, as a warning against extension of action. But appeal lies from sentences inflicted for contempt of Court: *Ambard v. Att.-Gen. for Trinidad*, [1936] A. C. 322; *McLeod v. St. Aubyn*, [1899] A. C. 549.

(*f*) *Canada Central Ry. Co. v. Thomas Murray* (1883), 8 App. Cas. 574. Nor will it necessarily allow a point of law to be raised for the first time if it involves dealing with facts already dealt with below: *Moolla Sons, Ltd. v. Burjorjee* (1932), 48 T. L. R. 279.

(*g*) The decision of which is declared to be final, saving the right of His Majesty to grant "special leave" to appeal: R. S. C., 1927, c. 35, s. 54.

(*h*) *Prince v. Gagnon* (1882), 8 App. Cas. 103.

(*i*) *Whittaker v. Durban Corporation* (1920), 90 L. J. P. C. 119. The question of abolishing the appeal was raised in November, 1933, but not carried further up to 1939.

(*k*) *Hull v. McKenna* (1923), [1926] Ir. R. 402. The appeal is now abolished.

(*l*) *Théberge v. Laundry* (1876), 2 App. Cas. 102; *Strickland v. Grima* (or *Parnis v. Agius*), [1930] A. C. 285.

(*m*) *Moses v. Parker*, [1896] A. C. 245 (Tasmania land Court guided by equity and good conscience). Contrast *Wi Matua's Will, In re*, [1908] A. C. 448 (New Zealand native land Court); *Singh (Raja Sarda Mahesh Prasad) v. Badri Lal Sahu* (1936), 1 All E.R. 361 (Board of Revenue's decision final does not exclude appeal).

(*n*) *Mgomini, Ex parte* (1906), 94 L. T. 558; *Tilonko v. Att.-Gen. for Natal*, [1907] A. C. 93. Cf. *Johnstone v. O'Sullivan*, [1923] 2 Ir. R. 13.

(*o*) 7 & 8 Vict. c. 69, s. 1. The Supreme Court may itself grant leave, under Order in Council, January 10, 1910 (S. R. & O., 1910, No. 70, p. 313).

(*p*) *Davis v. Shaughnessy*, [1932] A. C. 106.

(*q*) *Tilonko v. Att.-Gen. for Natal*, [1907] A. C. 93 (indemnity act); cf. Riddell, J.: "Thou shalt not steal" has no legal validity upon the sovereign body; *Florence Mining Co. v. Cobalt Lake Mining Co.* (1909), 18 Ont. L. R. 275; *Re Zaghul Pasha* (1923), 67 S. J. 382 (ordinance of Gibraltar for detention). In the same way it cannot order stay of execution in criminal causes, which is the business of the executive government: *Balmukand v. King-Emperor*, [1915] A. C. 629.

**English Courts and Colonial Jurisdiction.**—The law of a colony upon any particular point must be proved as a fact in an English Court, and this is usually done by an expert. Recourse may, however, be had to the provisions of 22 & 23 Vict. c. 63, which provides for the remission of cases by Courts in one part of His Majesty's dominions for the opinion in law of the Court in any other part of His Majesty's dominions. Proof, however, of the actual terms of a statute is facilitated by the Evidence (Colonial Statutes) Act, 1907 (7 Edw. VII. c. 16), and of other documents by the Evidence (Foreign, Dominion and Colonial Documents) Act, 1933 (23 & 24 Geo. V. c. 4). The prerogative rights of the Crown, such as forfeiture extend to the colonies; therefore, prior to 1870 and the abolition of forfeiture on conviction for felony, the Crown was held entitled to a colonial felon's goods (*r*). For most purposes colonial laws (*s*) and judgments are treated on the same footing as laws and judgments of any foreign country (*t*). But a system was devised in 1920 (*u*) to facilitate the enforcement, on the basis of reciprocity, of English judgments in the colonies.

By the Indian and Colonial Divorce Jurisdiction Act, 1926 (*x*), the Colonial Courts, as well as those of India, and since 1937 Burma, has been given jurisdiction to divorce on certain conditions persons domiciled in England or Scotland. The colonies which have thus been given jurisdiction include Kenya, Ceylon, Straits Settlements, Hong Kong, Jamaica.

The Maintenance Orders (Facilities for Enforcement) Act, 1920 (*y*), has been widely applied to colonies and protectorates.

The rule is that it is proper for colonial Courts to follow the judgments of the English Court of Appeal on points of English law where that law is also the law of the colony as common law or by enactment, and they should certainly follow the ruling of the House of Lords (*z*). It is a difficult question whether a colonial Court should follow a Privy Council judgment or a subsequent House of Lords judgment disapproving the former (*a*).

(*r*) *Bateman's Trust, In re* (1873), L. R. 15 Eq. 355.

(*s*) *Boardman v. Grand Trunk Ry. of Canada* (1933), 49 T. L. R. 218. English Courts will not attempt to intervene in any claim if a judgment would involve interference with matters under control of a Dominions government: Keith, *Journ. Comp. Leg.*, xv (1933), 263, 264.

(*t*) *Sydney Municipal Council v. Bull*, [1909] 1 K. B. 7.

(*u*) Administration of Justice Act, 1920 (10 & 11 Geo. V. c. 81), Pt. II. A like system is offered to foreign countries by the Foreign Judgments (Reciprocal Enforcement) Act, 1933 (23 Geo. V. c. 13), s. 7, which is also applied to the colonies, &c.: S. R. & O., 1933, No. 1073, and the Act of 1920 only stands in so far as it has been already executed. The new Act only operates under Orders in Council: see *Yukon Consolidated Gold Corp. v. Clark*, [1933] 2 K. B. 241. None have yet been issued for colonies, but India and Burma have been brought under the system.

(*x*) 16 & 17 Geo. V. c. 40; for Burma, S. R. & O., 1937, No. 230, p. 974. See Dicey and Keith, *Conflict of Laws* (1932), pp. 427, 945 ff.

(*y*) 10 & 11 Geo. V. c. 33; *Hague v. Hague* (1937), 106 L. J. P. C. 70.

(*z*) Cf. *Trimble v. Hill* (1879), 5 App. Cas. 342; *Robins v. National Trust Co.*, [1927] A. C. 515; *Brooker v. Thos. Borthwick & Sons*, [1933] A. C. 669.

(*a*) Cf. *Will v. Bank of Montreal*, [1931] 3 D. L. R. 526; *Negro v. Pietro's Bread Co.*, [1933] Ont. R. 112; Keith, *Journ. Comp. Leg.*, xv (1933), 261, 262; xvi (1934), 133; *The Dominions as Sovereign States*, p. 394.

*Minor Possessions.*

**Tristan da Cunha**, a small island near St. Helena, is a British possession, having been annexed on August 14, 1816, and garrisoned temporarily by English soldiers when Napoleon was confined at the latter place. A few who remained are the founders of the small settlement, augmented by coloured women from St. Helena and South Africa. There is no formal constitution or government, the inhabitants, numbering about 180, sharing their property in common under the management of the heads of the several families. But since 1933 there is a council of four, one of whom acts as chairman and island spokesman, celebrating marriages if there is no chaplain resident (*b*). There is a Tristan da Cunha fund in London. By Letter Patent of January 12, 1938, the island with Gough, Nightingale and Inaccessible Islands was made a dependency of St. Helena.

**Aden**, occupied in 1839, is a British possession, and since 1937 is a colony, as noted above. The British Government has treaty relations with the adjacent Arab tribes, both inland and along the coast from the Straits of Bab-el-Mandeb to Maskat territory at Ras Darbat Ali, which are referred to in the Anglo-Italian Agreement of April 16, 1938 (*c*), and now form the Aden Protectorate.

**Perim**, an island in the Red Sea, is a dependency of Aden since 1857, and is under the same administration. The island of **Kamaran**, 200 miles north, taken from the Turks in 1915, and renounced by Turkey in the Treaty of Lausanne of July, 24, 1923, is also under Aden; a quarantine station for pilgrims to Mecca is there established, but to judge from Art. 4 (2) of the agreement of 1938, British sovereignty does not exist, and cannot be now established.

**Socotra**.—By an agreement with the Sultan, British protection was formally extended to this island in 1886. Since 1876 it has been under the administration of Aden, and is now part of the protectorate.

**Pitcairn**.—This island, famed in the history of the mutiny of the *Bounty*, when it was settled (1780), was made subject to the jurisdiction of the High Commissioner for the Western Pacific in 1898 (*d*). He is also responsible for the **Phoenix** group, which is also a possession. It and other islands have been included in the Gilbert and Ellice Islands colony in 1937.

**The Maldivé Archipelago**, south-west of Ceylon, has been recognised as tributary to that island, and, no doubt, is to be deemed a British possession under a local sultan. The island is not included in the new constitutional system now in force, being expressly excluded by s. 2 of the Ceylon (State Council) Order in Council, 1931. There is a constitution of a simple kind, under which the present Sultan was elected in 1935. An annual embassy bearing presents to the governor

(*b*) This is a Pacific Islands Civil Marriages Order in Council, July 6, 1907.

(*c*) Parl. Pap., Cmd. 5726 (1938).

(*d*) See s. 6 of the Pacific Order in Council, 1893.

at Colombo is the chief contact with that colony, as the archipelago, 400 miles distant, is inaccessible.

**Unadministered Islands.**—In a large number of cases small, often uninhabited, islands are British territory, but not under regular administration. Such are the Kuria-Muria off the south-east of Maskat, ceded by its ruler for the landing of the Red Sea cable, since 1931 under the British Resident in the Persian Gulf. The Great and Little Basses and Minicoy in the Indian Ocean, with lighthouses, maintained by the Board of Trade, in respect of which dues are collected at Indian, Ceylon, Mauritius, and Straits ports fall under the government of India. There are various islands which are from time to time leased for guano collection or coconut planting by the British Treasury, *e.g.*, Amboyna Cay, and at one time Sprattley Island; Bell Cay and Bramble Cay, near British Papua, Raine Island, Caroline, Flint and Vostoc Islands, Malden Island, Starbuck Island, and in the South Atlantic Gough, Nightingale and Inaccessible Islands, which are now, as above noted, dependencies of St. Helena.

**Territories under Dominion Control.**—Other areas are under Dominion control. The Australian Antarctic Territory has been referred to above (*e*), and Ashmore and Cartier Islands were assigned to the Commonwealth by Order in Council, July 23, 1931 (*f*). Papua was placed under the Commonwealth with effect from September 1, 1906, and is now governed on Crown colony lines by a lieutenant-governor, an executive council, and a legislative council, five nominated members being added to the executive; the authority for legislation is s. 122 of the Constitution, and the Papua Act, 1905—24. Norfolk Island is governed under Norfolk Island Act, 1913; the governor-general in council legislates. From 160° east long. to 150° west long., the territory south of 60° south lat. forms the Ross Dependency administered by New Zealand under Order in Council, July 13, 1923 (*g*); the Dominion administers also the Union Islands transferred by the British Government in 1925—26 (*h*).

**Colonial Boundaries.**—These are defined in letters patent establishing colonies. Power to alter is given by the Colonial Boundaries Act, 1895, but in the case of the Dominions this requires their assent (*i*). The Act validates annexations of the past and authorises the various transfers above mentioned.

(*e*) See p. 504, *ante*. Authority to legislate is given by s. 122 of the Constitution. See Act No. 8 of 1933: legislation by governor-general in council.

(*f*) Act No. 60 of 1933: legislation by governor in council of Western Australia, operative from May 3, 1934; since 1938 by governor-general in council. By an exchange of notes of October 25, 1938 (Cmd. 5900), reciprocal rights of passage for aircraft over Adélie Land and British Commonwealth territory were accorded.

(*g*) See p. 530, *ante*.

(*h*) Orders in Council, November 4, 1925. See Keith, *Responsible Government in the Dominions* (1928), ii, 1040.

(*i*) 58 & 59 Vict. c. 34, amended for Australia by 63 & 64 Vict. c. 12, s. 8; for South Africa by 9 Edw. VII. c. 9, s. 7.

## CHAPTER IV.

## PROTECTORATES, PROTECTED STATES, AND FOREIGN JURISDICTION.

*British Protectorates.*

**The Nature of British Protectorates.**—Protectorates differ from colonies in that they do not form an integral portion of the territory of the protecting state (*a*), and are not therefore part of His Majesty's dominions. The amount of control exercised by various states over the internal administration of their protectorates has varied greatly, Germany (*b*), France, and other European nations claiming and exercising a much greater measure of control than was originally held justifiable by the United Kingdom. Both foreign and British protectorates, however, have these points in common:—

- (1) Internationally, they act as a barrier in favour of the protecting state, against conquest or occupation by or cession to any other state (*c*).
- (2) In all cases the protecting state assumes external sovereignty over the protected territory, and no other state can maintain diplomatic or political communication with it except through the medium of the protecting state.
- (3) International law gives foreign states the right to expect from the protecting state such supervision of the protecting state as to secure that due regard shall be paid to the rights of the subjects of such foreign states, and compensation paid for any violation of such rights (*d*).
- (4) Protectorates assumed by European Powers over barbarous tribes may generally be considered as a preliminary step to the exercise of complete internal and external sovereignty consequent on annexation (*e*).

**Extent of Jurisdiction.**—While other European nations claimed and exercised within their protectorates an unlimited jurisdiction in civil and criminal matters over both protected subjects and foreigners, the English standpoint at first made, as in the Zanzibar and Brunei Orders in Council, 1884 and 1890, the consent of the foreigner and also

(*a*) *R. v. Crewe; Sekgome, Ex parte*, [1910] 2 K. B. 576, 611.

(*b*) German protectorates would seem to have been protectorates in name only, and their administration based on the unrestricted sovereignty of the emperor. Cf. Hall, *Foreign Jurisdiction of the British Crown*, p. 208. These territories were surrendered in the Treaty of Versailles, 1919.

(*c*) See Hall, *International Law*, p. 150.

(*d*) See Wheaton, *Int. Law* (ed. Keith), i, 80 ff. On protectorates, cf. the Permanent Court's opinion in regard to Tunis: *Perm. Court Pub.*, Ser. B, No. 4.

(*e*) *E.g.*, the annexation in 1895 of British Bechuanaland to Cape Colony, of Zululand to Natal in 1897, of Kenya in 1920. See also Keith, *Letters on Current Imperial and International Problems*, 1935—36, pp. 131—136.

the consent of his Government necessary before a suit could be brought against him in the Protectorate Court (*f*). It appears that at the Berlin Conference of 1884—85 the British Government held a like view as to African protectorates, but by accepting the Brussels Conference, 1890, involving a much wider control over the territories, it necessarily adopted the current European doctrine. The jurisdiction exercised by the Crown in respect of the African protectorates depends primarily upon agreement or treaty with the native ruler or chief. But in cases where there is no responsible Government to grant jurisdiction, as in Southern Nigeria, it has been assumed by the Crown, either with or without opposition on the part of the native population, in order to afford protection to British commercial or political interests. Subject to the respect which on moral or political grounds is shown to agreements or treaties with native rulers or chartered companies, the Crown may by prerogative powers, based on (1) allegiance and (2) the power to accept cession of jurisdiction, or to take it by force of arms, or to exercise it without challenge, impose legislation on, or establish its jurisdiction over, protectorates. This right, as well in foreign countries generally as in protectorates, has been placed on a statutory basis by various Foreign Jurisdiction Acts, now consolidated in the Foreign Jurisdiction Act, 1890 (*g*), which enacts that whereas by treaty, capitulation, grant, usage, sufferance, and other lawful means, His Majesty has jurisdiction with divers foreign countries, . . . it is and shall be lawful for His Majesty to hold and enjoy any jurisdiction which His Majesty now has, or may at any time hereafter have within a foreign country, in the same and as ample a manner as if His Majesty had acquired that jurisdiction by the cession or conquest of territory (*h*).

**The Status of Protected Persons.**—An important question arises as to the status of British protected persons when in foreign countries. That they are not British subjects is clear, and in this they are in an

(*f*) This principle seems to have been based on the theory that the authority exercised by Great Britain is a delegated one only; and that the chief of barbarous tribes, having no jurisdiction over subjects of foreign nations, could not delegate such an authority to Great Britain. Cf. *Papayanni v. Russian Steam Navigation Co.* (1863), 2 Moo. P. C. 183.

(*g*) 53 & 54 Vict. c. 37. The form of the legislation is explained by the fact that legislation was first felt necessary in the case of the jurisdiction possessed by the Crown under the capitulations with the Ottoman Empire (6 & 7 Vict. c. 94). The wide character of the power is illustrated by *R. v. Crewe*, [1910] 2 K. B. 576, which shows the power to detain a chief under a proclamation made, under an Order in Council, by the High Commissioner for South Africa for the Bechuanaland Protectorate and *Sobhuza II. v. Miller*, [1926] A. C. 518, decides that an Order in Council expropriating lands is valid. So in *North Charterland Exploration Co. v. R.*, [1931] 1 Ch. 169.

(*h*) *Ib.* s. 1. By s. 2, where a foreign country is not subject to any government from whom His Majesty might obtain jurisdiction in the manner recited, His Majesty is to have jurisdiction over His Majesty's subjects for the time being resident in or resorting to that country. Objection has been taken to this limitation of the Crown's jurisdiction to His Majesty's subjects on the ground that it might be open to a foreign subject to plead this section in support of a plea of want of jurisdiction: see Hall, *Foreign Jurisdiction*, p. 221; but since other European nations claim and exercise jurisdiction over British subjects within their protectorates, they could not plead international law in support of such a contention, and, as stated in the text, full power is now assumed.

inferior position to the protected subjects of other European nations, who are regarded for the most part by their respective governments as subjects proper. They are, however, entitled to diplomatic protection when in foreign countries, and in foreign countries with independent governments in which His Majesty's jurisdiction has been established by Order in Council (*i*) they are virtually in the same position as British subjects, being exempt from local laws (*k*). A like position is ascribed to subjects of the Indian States, since these are now strictly protectorates (*l*).

British protected persons are defined by Order in Council of May 14, 1934, to mean (1) any person born in the area who is not a British subject and does not possess the nationality of a foreign state, and (2) any person born elsewhere similarly qualified, whose father was at the time of birth a protected person. These persons are regarded as belonging to the territory in question, and the wife of any such person also belongs if she has no other nationality and becomes resident with her husband with governmental consent. The status is lost on becoming a British subject or foreign national, while a woman loses it also if by marriage she attains a foreign nationality. The Order applies also to the mandated territories under British control.

**Classification of Protectorates.**—The extent and the mode of interference by the Crown in matters of internal administration, or, in other words, the powers of internal sovereignty exercised by the Crown, form a basis on which the various British protectorates may be classified, it being understood that in all cases the Crown controls foreign relations.

From this point of view British protectorates may be classed as (1) protectorates of colonial type, and (2) protected states.

**Colonial Protectorates.**—The first group comprises those protectorates in which the amount of control exercised by the Crown is very nearly equivalent to that exercised in Crown colonies proper. Such protectorates differ from Crown colonies in little more than name. Apart from the fact (1) that they have not been formally annexed and do not form a portion of British territory (*m*), and (2) that the control exercised depends not upon conquest, cession, or settlement, but either upon agreement with native rulers or chartered companies,

(*i*) *E.g.*, formerly Persia, Siam; the Persian coasts and islands, and still in Maskat, Bahrein, Kuwait, Spanish Morocco, China, Kashgar; in Ethiopia *de facto* Italian authority in 1937 was exercised over persons subject to the Ethiopia Order in Council, 1934, and British recognition (November 16, 1937) of the Italian conquest terminates the régime therein. For Egypt, see Cmd. 5491 (1937). Jurisdiction is now confined to members of the British forces and the military mission; Order in Council, October 2, 1937 (S. R. & O., No. 936, p. 759), and to issues of status.

(*k*) See Hall, *Foreign Jurisdiction*, p. 128.

(*l*) 53 & 54 Vict. c. 37, s. 15. For an example of such an order, see the British Protectorates Neutrality Order in Council, October 24, 1904 (S. R. & O., 1904, Nos. 1653, 1716).

(*m*) Hence the institution of domestic slavery was not forbidden under the Imperial legislation abolishing slavery, and had to be dealt with in Sierra Leone: see Parl. Paper, Cmd. 3020. Legislation was passed also in the other territories.

or has been assumed without definite treaty or agreement, there is little to distinguish them from the latter (*n*).

**Administration and Legislation.**—The internal administration is regulated by Order in Council, and is entrusted either to the governor of some adjacent colony (*o*) or to a governor and commander-in-chief, high commissioner, or resident commissioner subordinate to a high commissioner, appointed specially for the protectorate, who takes the place of a governor in a Crown colony, and whose powers are similar to those of the latter. In the more important territories executive and legislative councils have been created with the same constitution, powers, and functions as in the colonies, the Crown retaining the right to disallow laws and to legislate by Order in Council. But much use is made where possible of the principle of indirect rule through native chiefs with organised authority to administer, raise taxes, and exercise criminal and civil justice, subject to the supervision of European officers. The widest power is that of the Kabaka of Buganda, in Uganda, a kingdom of considerable autonomy, but the emirates of Northern Nigeria (Kano, Sokoto, Bornu, &c.) are also allowed a large measure of authority. The merits of this system of rule are very variously viewed.

**Judicial Systems.**—The judicial system also is regulated by Order in Council or local ordinance, High Courts of justice being established and lower tribunals under local magistrates. Appeal lies in some cases to the Supreme Court of some adjacent colony, or protectorate, and thence to His Majesty in Council; in other cases to His Majesty in Council direct. For the West African territories, colonies and protectorates, there is a West African Court of Appeal (*p*). As now constituted, it hears appeals from the Supreme Court of Nigeria, the Supreme Court of the Gold Coast (which has jurisdiction over the colony, Ashanti, the Northern Territories, and Togoland), the Supreme Courts of Sierra Leone and the Gambia, the High Court of the protectorate of Nigeria, and the Courts in the protectorates of Sierra Leone and the Gambia. Similarly, as regards East Africa, Uganda, Kenya colony and protectorate, Nyasaland, including Zanzibar, a protected state, and Tanganyika, a mandated territory, but not Somaliland (*q*). The appeal to the Privy Council lies only from these Courts (*r*). In some of the African protectorates jurisdiction, both civil and criminal, was specifically assumed by the Order in

(*n*) Hence they are dealt with on the same basis in H.M.'s Regulations for the Colonial Service.

(*o*) *E.g.*, the Southern Nigeria Protectorate (see Order in Council, February 16, 1906), which is now amalgamated with the Northern Nigeria Protectorate under the name of the Nigeria Protectorate, of which the administration was entrusted to the governor and legislative council of the colony of Southern Nigeria.

(*p*) Orders in Council, November 1, 1928; January 20, 1930; February 26, 1934 (as to Nigeria); May 4, December 20, 1935; May 10, 1938.

(*q*) Orders in Council, July 14, 1921; July 30, 1923. Nyasaland is included, but not Northern Rhodesia.

(*r*) For West Africa, Orders in Council, January 20, 1930; February 26, 1934; May 4, 1935; for East Africa, Orders in Council, July 14, 1921; July 30, 1923. These really are not prerogative but statutory orders, though treated as prerogative in form of enactment and classification in the S. R. & O.

Council over all persons within the limits of the Order, whether British subjects, natives, or foreigners (*s*). In others, whilst jurisdiction was assumed over British subjects and natives, the extent of the jurisdiction over foreigners was left undetermined by the earlier Orders (*t*), but in fact is exercised as of right in all cases now.

**The Existing Protectorates.**—Thirteen protectorates may be placed in this group, some of which (*e.g.*, the former East African Protectorate, Somaliland, Nyasaland) were formerly under the Foreign Office; they are now controlled by the Colonial Office.

These protectorates are:—

Somaliland, and Aden Protectorate, legislated for by the governors (*u*).

Kenya Protectorate, legislated for by the legislative council of the colony (*x*), and under the control of the governor of the colony, and the executive council.

Uganda Protectorate, under a governor, with an executive council and a nominated legislative council, six officials and four non-officials. The railways, ports, wharves, and steamships of Kenya and Uganda are placed under the Governor of Kenya as High Commissioner for transport, aided by an Advisory Council, under the Kenya and Uganda (Transport) Order in Council, 1925.

Nyasaland Protectorate (*z*).

Northern Rhodesia, separated in 1923 from Southern Rhodesia, and in 1924 placed under Crown control, with governor, executive and legislative councils, the latter now having an elective minority of seven, to nine nominated and *ex officio* members (*a*).

Swaziland (*b*) and Bechuanaland, legislated for by the High Commissioner for Basutoland, the Bechuanaland Protectorate and Swaziland, as the High Commissioner for South Africa is renamed.

Nigeria (*c*), which forms a unit with the colony (formerly Lagos).

(*s*) This is the case in the East Africa (now Kenya) Protectorate, Somaliland, and Uganda. The Pacific Order in Council, 1893, adopts the same principle.

(*t*) This was the case in Nigeria and Nyasaland.

(*u*) Somaliland Orders in Council, December 17, 1929; March 28, 1930; April 23, 1932; May 4, 1935; Aden Protectorate Order, March 18, 1937; Royal Instructions, March 24, 1937.

(*x*) Kenya Protectorate Order in Council, August 13, 1920.

(*y*) Uganda Orders in Council, August 11, 1902; May 17, 1920, constituting the councils.

(*z*) See the Nyasaland Order in Council, July 6, 1907, by which the name of the British Central Africa Protectorate was changed to Nyasaland, and a governor and commander-in-chief appointed with executive and nominated legislative councils; the latter has four official and four nominated non-official members. For English law, see Order in Council, December 21, 1907.

(*a*) Orders in Council, February 20, 1924; legislative council, May 7, 1929; February 21, 1935; July 29, 1937.

(*b*) Orders in Council, June 25, 1903, resulting from acquisition of protectorate by conquest of the Transvaal; December 1, 1906. For Bechuanaland, see Orders in Council, May 9, July 30, 1891, October 18, 1909.

(*c*) See p. 537, *ante*.

Gambia Protectorate, for which the legislative council of the colony legislates (*d*).

Sierra Leone Protectorate, for which there is a legislative council as a unit with the protectorate (*e*).

Northern Territories of the Gold Coast (*f*).

British Solomon Islands Protectorate, legislated for by the High Commissioner for the Western Pacific (*g*).

**Protected States.**—Group II. comprises Sarawak, North Borneo, Brunei, The Federated Malay States, Johore, Kedah, Perlis, Kelantan, Trengganu, Zanzibar, and Tonga.

In these at first the internal administrations were left almost entirely in the hands of the native government, internal independence having been secured to them by the terms of the treaty or agreement by which the protectorate is constituted.

At present the position of these states differs considerably as regards both the amount of British authority and the mode of its exercise, but all are regarded as possessing sovereignty (*h*) in the sense that their rulers in England are immune from jurisdiction.

(i) In Sarawak (*i*) and North Borneo (*k*) the Crown has exclusive

(*d*) Order in Council, November 23, 1893; Ordinance No. 2 of 1935. All the colony, save the island of St. Mary, is administered with the protectorate. See Letters Patent, February 27, 1915, Royal Instructions, February 27, 1915, June 26, 1928.

(*e*) Order in Council, January 16, 1924; as to council, Orders in Council, January 16, 1924; June 29, 1931. Letters Patent, January 28, 1924; Royal Instructions, January 28, 1924; January 19, 1929, deal with the colony. There are three chiefs to represent the protectorate, and three elected members as well as four nominated members from the colony. There are eleven official members, and the executive council acts for the protectorate.

(*f*) The governor of the Gold Coast Colony exercises the jurisdiction of His Majesty; appoints a chief commissioner, judges, &c.; and legislates by ordinance subject to disallowance by His Majesty in Council or through a Secretary of State. See Orders in Council, September 26, 1901; July 14, 1922, and November 9, 1934, superseding them. The laws in Gold Coast were applied by Order in Council, September 26, 1901, and the executive council acts also for the Northern Territories.

(*g*) Under the Pacific Order in Council, 1893, and subsequent Orders (July 6, 1907; September 26, 1908; April 22, 1910), the high commissioner, who is also governor of Fiji, controls also the Gilbert and Ellice Islands Colony, Pitcairn Island, the Phoenix group of islands leased for guano extraction (see p. 552, *ante*), and the protected state of Tonga, and exercises, under Orders in Council (June 20, 1922; March 12, 1923), the British jurisdiction in the New Hebrides, which is a condominium with France under conventions of 1906 and 1922. There is for certain limited purposes a joint administration, but for many purposes jurisdiction is exercised independently by a resident commissioner who has power to legislate, subject to disallowance by the high commissioner who has concurrent power. The Supreme Court at Fiji is a Court of appeal from the local Courts.

(*h*) *Mighell v. Sultan of Johore*, [1894] 1 Q. B. 149; *Duff Development Co. v. Govt. of Kelantan*, [1924] A. C. 797.

(*i*) The history of Sarawak is interesting: cf. p. 532, *ante*. The government was granted to Sir James Brooke (known as Rajah Brooke) by the Sultan of Brunei in

(*k*) The British North Borneo Company, incorporated by charter, November 1, 1881, acquired its territory from a syndicate in 1882, the syndicate having secured it from the Sultans of Brunei and Sulu in 1877–78; it has received some additions later. The present protectorate rests on agreement of May 12, 1888 (C. 5617 (1888)). The Crown has the power to approve the appointment of the governor, and the charter secures the British character of its board of directors. Moreover, the Crown could control the company under its terms if misgovernment occurred; see an investigation into complaints, Cmd. 1060 (1920). Appeal lies to the Privy Council from the High Court: Order in Council, November 28, 1914.

control of foreign relations, but does not intervene in internal affairs, nor does it exercise consular jurisdiction over British subjects, though it has the right to appoint consuls who could probably do so, and could, of course, assert it effectively at any time. The ruler of Sarawak is an absolute monarch. The company has legislative power exercised through the governor, whose appointment the Crown must approve, with an advisory council. The law is partly based on the Indian Codes, and both Muhammadan and native laws are administered in native Courts.

(ii) In Brunei and the other Malay States consular jurisdiction is now likewise not asserted (*l*). In lieu the power of the British Government is exercised through Residents in Brunei and the Federated States, a General Adviser in Johore, and Advisers in the other states. They are under the immediate control of the High Commissioner, who is the Governor of the Straits Settlements. He is by commission of March 16, 1931, High Commissioner for the Protected States in the Malay Peninsula. He controls relations with Brunei, and is British Agent for North Borneo and Sarawak under commissions of December 10, 1906, and March 18, 1908.

*Brunei*, once a powerful state, has been reduced to insignificant proportions by cessions. Formerly consular jurisdiction was used, but since 1908 when by local enactment a British Resident's Court was given full power of jurisdiction, the laws of the Straits Settlements and the Federated Malay States to be applied, with appeal to the Supreme Court of the Straits, and thence to the Privy Council (*m*), consular authority has ceased to be requisite. The Resident's appointment dates from January 2, 1906, the protectorate from 1888.

In the case of the *Federated Malay States* (comprising Perak, Selangor, Negri Sembilan and Pahang), a British resident-general, now styled "federal secretary" (under the governor of the Straits Settlements, who is also high commissioner), was appointed, to control the British residents in each state, under an agreement made with the various states in 1895. In 1909 and 1927 a federal council was created, now composed of the High Commissioner, and not less than twelve official and eleven nominated members, including a native member from each state, which deals with all legislation of a general character, and the estimates for each state. Other matters, especially those affecting the Mohammedan religion, mosques, political pensions, and

1842, and further concessions of territory were made in 1861, 1882, 1885, 1890, and 1905. An agreement was made with Rajah Brooke on June 14, 1888, by which Sarawak became a British protectorate, His Majesty's Government having power to settle questions relating to succession, and the right to establish consular agencies and control foreign relations, but no power to interfere in the internal administration. The present Rajah is Sir Charles Vyner Brooke. The sovereign is absolute, but has a supreme council of four European and seven Malay officers, and a general council of fifty European and Malay officials and chiefs summoned triennially. There is a chief justice, and a certain legalisation of the administration is in progress, but there is no fixed constitution. No appeal to the Privy Council is provided for, but as suzerain the Crown might allow it if desirable, nor could the sovereign refuse obedience.

(*l*) The distinction between places in which jurisdiction is exercised, and those in which it is not, is seen in the Colonial Probates (Protected States and Mandated Territories) Act, 1927 (17 & 18 Geo. V. c. 43).

(*m*) Order in Council, September 26, 1908.

native chiefs, rest with the state councils of the Sultans in which the Residents sit, with, since 1932, Malay chiefs and officials and representatives of European, native, Chinese and Indian interests. State laws are valid so far as not repugnant to federal laws. The administration is conducted by European officers in large measure on colonial lines. There are state Courts presided over by British judges, and a federal Court of Appeal whence appeals go to the Privy Council (*n*). The rulers are bound to accept advice when given save in matters affecting religion, and they unite to maintain a force of Indians and Malays under European officers for service throughout the states.

By a treaty, concluded in 1909, the Siamese Government transferred to Great Britain all its rights of suzerainty, protection, and control over the States of *Kelantan*, *Trengganu*, *Kedah* and *Perlis*, with the islands adjacent, lying to the north and north-east of the Federated Malay States, the latter assuming the indebtedness of the transferred states to Siam. The states have gradually—*Kelantan* from 1909, *Trengganu* in 1910 and 1919, *Kedah* in 1923, and *Perlis* in 1930—accepted by agreement the general control of British advisers, but retain much more autonomy in local issues than do the Federated States. They have councils on which the adviser sits. No appeal lies from their Courts to the Privy Council, and only in *Kedah* is there a judicial Court of Appeal.

The control of foreign relations in *Johore* was handed over to Great Britain in 1895 by the Sultan of *Johore*, the latter also agreeing to receive a British agent with consular functions, and in 1914 a General Adviser was substituted. The Sultan created a written constitution in 1895, with a council of Malay ministers, an executive council including British officers, and a legislature, to which European and Asiatic unofficial as well as official members are appointed. Appeal lies to the Privy Council from the Court of Appeal (*o*), subordinate to which is the Supreme Court, the judges of which are interchangeable with those of the Federated Malay States and the Straits Settlements. Mohammedan causes are dealt with in the Court of *Kathi*, with appeal to the Sultan in executive council.

(iii) In *Zanzibar*, which has been a protectorate since 1890, under Foreign Office control to 1913, there is complete control exercised over the Sultan by a British Resident, who is Vice-President of the Sultan's executive council and President of the legislative council, which is part nominated, part *ex officio*. The Sultan's decrees countersigned by the Resident binds all persons, including foreigners. Justice is administered to British subjects and protected persons in a consular High Court, to others in the Sultan's Court; from both appeals lie to the Eastern African Court of Appeal and thence to the Privy Council (*p*).

(*n*) Order in Council, December 16, 1912.

(*o*) Order in Council, March 9, 1921; *Johore Courts Enactment*, 1920.

(*p*) Orders in Council, providing for the exercise of His Majesty's jurisdiction, December 8, 1924; June 25, 1925; February 1, 1926 (decrees); January 31, 1936 (appeals to Eastern Africa); for appeal to Privy Council, July 14, 1921; in the case of the Sultan's Court, July 30, 1923; Sultan's decree providing for the administration

(iv) In Tonga, under a constitution of 1875, as amended up to 1933, there is a Queen, with a Privy Council, Cabinet Council, and elected (q) Parliament, under a British protectorate of May 18, 1900, with a British agent and consul whose jurisdiction extends to all British subjects and foreigners charged with offences punishable with death or over two years' imprisonment. There is no appeal from the Tongan Court to the Privy Council, but from the Consular Court appeal lies to the Supreme Court of Fiji, and thence, as usual, to the Privy Council.

### *Spheres of Influence.*

From 1880 to 1914 European states frequently came to mutual understandings to respect certain territories, especially in Africa and Asia, as being within the "sphere of influence" of some particular state. When such an understanding had been arrived at the particular state was recognised to possess the moral right to exclude other states from interference in the territory in question, this right being based upon the recognition by other states that the territory was important to the particular state for purposes of future expansion from adjacent colonies or protectorates, or as being strategically valuable.

The influence exerted by particular states in such territories prepared the way for the acceptance of that fuller control which is exercised in protectorates, and spheres of influence in several cases merged into protectorates. This process resulted in the final partition of Africa and of the Pacific Islands. The removal of German control from Africa has for the time being eliminated the understandings of 1898 and 1913—14 as to her interest in parts of Portuguese Africa. Italian aggression, in defiance of the League covenant, the Kellogg Pact, and other treaties, has eliminated British interests in Ethiopia, as well as those of France. On the other hand, Italy under the agreement with Britain of April 16, 1938, now shares with Britain her former control in Arabia. On the other hand, the spheres planned under the Anglo-Russian accord of 1907 have fallen with the Persian revolution and the assertion of the full independence of Persia, and similarly as regards Afghanistan, which achieved independence in 1919. In that of China the doctrine of equality of rights was asserted by the Washington Conference and the Nine-Power Treaty of 1921; but it can hardly be said to have had much weight, Japan having since secured virtual control of the Empire of Manchukuo, proclaimed January 8, 1934, and the U.S.S.R. and Japan claim spheres of influence in Inner Mongolia and Outer Mongolia and Northern China respectively, large portions of which are at present under Japanese occupation.

### *Egypt and the Sudan.*

**Egypt.**—Egypt was, until 1936, and in some degree still remains in an anomalous position. From 1879 the government was controlled

of justice and the constitution of Courts, 1923—34 (Laws, 1934, c. 3); decrees as to executive and legislative councils, January 15, 1926; November 9, 1934; December 26, 1936.

(q) Seven peers elected by the peers, seven by the people triennially and the nine ministers. The Privy Council is made up of two European and six native members.

by France and the United Kingdom by agreements with the Khedive. The refusal of France to take part in suppressing Arabi Pasha's revolt in 1882 led to the substitution of sole British control by Khedivial decree of January 18, 1883. The situation was regulated by convention with Turkey of October 24, 1885, but, on the outbreak of the Great War and the adherence of the Khedive to the Turkish cause, a protectorate was proclaimed on December 18, 1914, and a new Sultan appointed. On the conclusion of the War political agitation ensued as a result of oppressive treatment of the fellahin in the later period of the war, and after abortive attempts at a treaty the independence of Egypt was declared by the British Government in February, 1922 (*r*), with the reservation of the questions of imperial communications, the protection of foreigners and of minorities among the Egyptian population, and the status of the Sudan. The Sultan on March 15, 1922, proclaimed the independence of the country as a kingdom. Further attempts to secure agreement and the removal to the canal region of the British forces of occupation failed in 1930. But in 1936, when Italian aggression had warned Egypt and Britain of their mutual interests, accord was reached. The complete independence of Egypt was recognised, but an alliance was established securing British protection for Egypt against aggression and Egyptian facilities for British forces engaged in her defence. The British Ambassador is accorded perpetual primacy at the Court of Egypt. The British forces, which are not an army of occupation, but for the defence of the Suez Canal as vital to British communications with India and Australasia, are gradually to be withdrawn to the canal zone. British control of the protection of foreigners and minorities is waived, and British aid on May 8, 1937, secured at the Montreux Convention the abolition of the capitulations still binding Egypt and her admission to the League of Nations (*s*), and British forces will ultimately be withdrawn when Egypt is in a position to defend the canal by her own—at present very small—forces, which are to be increased and trained on British lines, with the aid of a British military mission. Egypt has decided also to create a naval force to act with the British Navy in her defence.

The British interest in communications centres, of course, on the importance of the Suez Canal to connection with India, and in 1928 it was made clear that an attack on Egypt would be regarded by the United Kingdom as permitting resort to war as a measure of defence legitimate under the Paris Pact for the renunciation of war (*t*).

The Suez Canal was completed in 1869, and its management is in the hands of thirty-two administrators, ten of whom are British. In 1875 the British Government purchased from the Egyptian

(*r*) Cmd. 1592, 1617 (1922).

(*s*) Treaty, August 26, 1936, with a convention regarding immunities and privileges of the British forces in Egypt. The forces are necessarily subtracted in the main from Egyptian jurisdiction and left, as in the past, to British control. See Cmd. 5270. For the Montreux Convention, see Cmd. 5491. For the exercise of jurisdiction over the forces and the military mission, see Order in Council, October 2, 1937 (No. 936), p. 759. The terms of the treaty of 1936 were modified by a protocol of September 22, 1938, solely in Egyptian interests; Cmd. 5861.

(*t*) See Sir A. Chamberlain in Cmd. 3109, p. 25.

Government 176,602 shares out of 400,000 of 500 francs in the canal for the sum of £3,976,582 (*u*). By a convention signed by the Powers at Constantinople in 1888 (*x*), the canal is open to ships of commerce or war of all nations both in time of peace and war. The canal may not be blockaded, nor may any act of hostility be committed within three miles of either port of access. *De facto*, of course, this meant nothing in the War of 1914—18, but the argument that this obligation was not affected by Art. 16 of the League of Nations covenant on the application of sanctions against Italy was used to justify the non-interference with the transit of Italian ships bearing troops, thus reducing the covenant to a farce (*y*). As we have seen on October 6, 1938, the Prime Minister made it clear that the covenant has no legal value.

Egypt has a modern constitution of a constitutional (*z*), monarchical character, but the power of the Crown as exercised in fact was very considerable. Under the new monarch, a minor until February 11, 1937, there was a Council of Regency, and the Chamber of Deputies was in control. Since then the King has replaced the ministry by one more royalist in attitude which obtained a marked victory at the polls.

**The Sudan.**—The Sudan is subject to a formal condominium between Egypt and the United Kingdom under agreement of January 19, 1899, negating the Turkish claim to suzerainty and basing the claim on conquest. The system was applied to Suakim by agreement of July 10, 1899. Imports into the Sudan from Egypt are free of customs, and duties on goods entering by the Red Sea ports may not exceed those on goods imported via Egypt. All military and civil control is vested in the governor-general who has the right to legislate, but consults in all matters, save military issues and appointments, a council created in 1910, now comprising four members *ex officio* and three nominated. After the assassination of Sir Lee Stack in 1924 all Egyptian forces were withdrawn, and only British and Sudanese forces remained. But the treaty with Egypt of 1936, while recognising the condominium, by Art. 11, and avoiding any prejudice to the question of sovereignty, provided for the return of Egyptian forces to the Sudan to serve under the governor-general, the admission of Egyptians to the civil service as well as British, unrestricted immigration of Egyptians save on grounds of public order and health, the absence of discrimination between British subjects and Egyptian nationals in matters of commerce, immigration or the possession of property. Financial questions were regulated by a further agreement of

(*u*) See agreement with Egypt, November 25, 1875 (Hertslet, *Comm. Treat.*, xiv, 1030), confirmed by 39 & 40 Vict. c. 67.

(*x*) Convention of October 29, 1888 (Hertslet, *Comm. Treat.*, xviii, 369). The convention is reaffirmed by the Treaty of Lausanne, 1923, Art. 109; and by an agreement between Britain, Italy and Egypt, April 16, 1938 (Cmd. 5726).

(*y*) Keith, *Letters on Current Imperial and International Problems*, 1935—36, pp. 154, 156, 163, 184.

(*z*) The constitution of April 19, 1923, was violated by the Sultan and drastically revised October 22, 1930. The restoration of the old constitution was opposed by Sir S. Hoare in 1935, but Egypt showed such resentment that the British Government wisely allowed restoration, and concluded a treaty in 1936 with a truly representative government: see Keith, pp. 93—97.

November 5, 1936 (a). As a sign of Egyptian status, all future application of, and termination of, international conventions for the Sudan require joint British and Egyptian action. An Egyptian economic expert is chosen to serve at Khartoum, and an Egyptian military secretary aids the governor-general. The governor-general is formally appointed by Egyptian decree with the consent of the British Government, the budget is submitted to the Egyptian Government for approval and audit, irrigation is regulated by agreement with Egypt (b), but otherwise the regime is autonomous, and the Secretary of State for Foreign Affairs, who is in final control, through the British Ambassador in Egypt, does not intervene in detail. The suggestion, however, that the governor-general is legally above all control is absurd; he reports regularly to the Secretary of State, and with his approval has carried out a system of increasing development of the use of native authorities in administration and judicature, under which the fullest recognition possible is given both to Muhammadan and native laws.

The omission of the Sudan from the list of countries connected with the Crown in the Official Coronation Souvenir Programme of 1937 may be assumed to indicate the probable surrender of the claim to joint sovereignty in favour of the Egyptian Crown, unless indeed British rights are transferred to Italy in part settlement of the territorial claims of that power (c).

#### *Foreign Jurisdiction.*

**Area of Operation.**—The incompatibility of the institutions of certain countries with Western civilisation led in their case to the practice of allowing Western traders to enjoy a measure of immunity from local law and of exercise of jurisdiction by their own nationals. The usage started in the Ottoman dominions, was followed to some degree in India, and was widely extended by 1900, but since has been greatly restricted. The Treaty of Lausanne, 1923, approved by 14 & 15 Geo. V. c. 7, and by Order in Council of August 12, 1924, terminated it as regards Turkey; Persia by unilateral denunciation secured its cessation in 1928—29; in Siam it was terminated by a series of treaties ending in 1926 (d). It remains in China, despite efforts at unilateral denunciation, but in principle its abolition is accepted as proper as soon as effective protection for foreigners by improvement of the Courts, their freedom from military interference, and the operation of

(a) Parl. Pap., Cmd. 5319 (1936). The Sudan owes Egypt at least £E5,174,493, which it is to pay off eventually. Egypt, on the return of her army to the Sudan, was empowered to withhold the subsidy of £E750,000 hitherto paid for defence.

(b) A part of the territory is still unadministered: see Cmd. 5281 (1936); 5575 (1937); Sudan Almanac, 1939; Hamilton, *Anglo-Egyptian Sudan from Within* (1936).

(c) Keith, *The King, the Constitution, the Empire and Foreign Affairs*, 1936—37, pp. 135—137; *The Scotsman*, January 28, 1939.

(d) Order in Council, May 7, 1928, suspending the operation in general of the Persia Orders in Council, 1889, 1913, and 1921, and the Persian Coast and Island Orders of 1907, 1912, and 1922. For Siam, see treaty of July 24, 1925; Cmd. 2642; superseded by treaty, November 23, 1937 (Cmd. 5608; an Order in Council, June 28, 1926, regulated the final remnant of temporary jurisdiction, and in 1938 even the right of evocation was abandoned by notes of November 23, 1937 (Cmd. 5611).

the new codes (*e*). This was reasserted in 1939 on the occasion of the Japanese declaration in favour of surrender of such rights. It is also in force in Kashgar (Chinese Turkestan), Bahrein, Kuwait, Maskat, Morocco (Spanish Protectorate), and was operative until 1937 in Egypt. In Egypt the system was modified by the existence of the mixed Courts, an institution established by the consent of the chief powers interested in Egypt to deal with issues between foreigners of different nationalities, other than issues of status (*f*). The abolition of this jurisdiction was contemplated by Article 13 of the treaty with Egypt of August 26, 1936. In general, the extinction of jurisdiction in Egypt was secured by the Montreux Convention of May 8, 1937, and British jurisdiction by Order in Council of October 2, 1937, is restricted to two cases only, (1) those of the British forces and the military mission, and (2) certain issues of status wherein the nationality of the person concerned is decisive. Nationals of Eire and the Union of South Africa do not fall under this jurisdiction, and thus their non-British character is asserted (*g*). The mixed Courts will ultimately disappear. In Ethiopia the operation was incompatible with the Italian conquest, but that conquest could not *de jure* be recognised by the United Kingdom without either violation of Article 10 of the League covenant, or alteration of the covenant to allow of the destruction of Ethiopian membership. In November, 1938, effect was given to the agreement of April 16, 1938, recognising the conquest *de jure* in defiance of the covenant.

**Character of Jurisdiction.**—The jurisdiction of the Crown is regulated by the Foreign Jurisdiction Act, 1890 (*h*). It empowers the constitution of Courts of civil and criminal jurisdiction, the regulation of their procedure, and the definition of the persons subject to their jurisdiction, and the making of rules binding such subjects, including the operation of a number of Acts (*i*). Power is given to send persons charged with offences for trial in a British possession (*k*), and to assign jurisdiction to Courts in such possessions (*l*); persons condemned in a foreign country may be sent to other places and their detention en route is legalised (*m*). Any Order in Council is valid unless repugnant to an Act or regulation under an Act applying to the foreign territory (*n*).

(*e*) Parl. Paper, Cmd. 3480 (1930). In Japan and Corea jurisdiction was withdrawn by Orders in Council, October 7, 1899; January 23, 1911.

(*f*) They also deal with questions of land even if all parties are of the same nationalities: Hertslet, Comm. Treat., xiv, 306.

(*g*) Parl. Pap., Cmd. 5360; Montreux Convention, Cmd. 5491; S. R. & O., 1937, No. 936, p. 759.

(*h*) 53 & 54 Vict. c. 37; extended by 3 & 4 Geo. V. c. 16; Companies Act, 1929 (19 & 20 Geo. V. c. 23), ss. 106, 381, 384, Sch. 12, Pt. i; 22 & 23 Geo. V. c. 9, ss. 36 (2), 64 (2), as to merchant shipping (safety and load-line conventions); 24 & 25 Geo. V. c. 49, ss. 13 (2), 18 (3), as to whaling.

(*i*) *Ib.* ss. 1, 5.

(*k*) *Ib.* s. 6.

(*l*) *Ib.* s. 9. *E.g.*, Bombay in the case of Kuwait, Order in Council, 1935, Art. 17.

(*m*) *Ib.* ss. 7, 8. *E.g.*, Bombay, Kuwait Order, Art. 20.

(*n*) *Ib.* s. 12. They must be laid before the Parliament and have force as if enacted in the Act (s. 11). *E.g.*, Foreign Jurisdiction (Military Forces) Order in Council, 1927 (S. R. & O., 1927, No. 359, p. 478); (Probates) Order in Council, 1935 (S. R. & O., 1935, No. 896, p. 522). See *Bartlett v. Bartlett*, [1925] A. C. 377.

The Orders made under the Act create Courts, in China (o) and formerly in Egypt (p) on an elaborate scale, and provide fully for all sides of their jurisdiction, and authorise the making of regulations locally binding on persons subject to the Orders, their registration, &c. In Egypt the general power is replaced by a power to make rules of Court under the Order of 1937. Appeal lies to the Privy Council from the highest tribunal, in China the Supreme Court, in Egypt the Full Court, which is constituted of the judge, and the Chief Justices of Cyprus, Palestine and the Sudan, in Bahrein, and Maskat (q) the Court of the Political Resident in the Persian Gulf; the Kuwait Order is silent on this point; in the case of these territories relations with the Foreign Office are conducted largely through the governor-general of India in council; but in Morocco the Supreme Court of Gibraltar has concurrent jurisdiction, and appeal lies to it (r); in Kashgar to the High Court at Lahore, and thence to the Privy Council.

Control is exercised over all classes of British subjects (s) and British protected persons, including natives of British protectorates, protected states, and the Indian states, and sometimes by usage other persons, while jurisdiction over foreigners can be exercised by consent of their governments.

**Persian Gulf States.**—In addition to these fully organised systems, there exist less formal relations between the Crown and the chiefs near the colony of Aden, as above noted (p. 551). Further, the tribes of the Trucial Oman coast from Ras-al-Khaima to Odaid are bound by treaties with the Indian Government to maintain a maritime truce to prevent piracy and slave trading (1820 and 1853), and in 1892 they agreed not to enter into relations with or cede territories to any power save Britain. This position seems to be recognised by Art. 6 of the Anglo-Italian Agreement of April 16, 1938 (t). The Political Resident in the Persian Gulf is the recognised arbiter and adviser, and his Court serves to deal with any causes affecting British subjects and protected persons.

(o) China Order in Council, 1925, amended April 19, 1933; March 18, 1937. There is a separate order for Kashgar: China (Kashgar) Order, 1920, amended April 1, 1922; April 30, 1936.

(p) Egypt Order in Council, 1930 (S. R. & O., 1930, No. 744), amended December 20, 1934. For the present Courts, see S. R. & O., 1937, No. 936, Arts. 10, 11, 18.

(q) A new treaty with Maskat was signed on February 5, 1939.

(r) In such a case jury trial is obligatory as the ordinary rules of the Court apply: *Spilsbury v. R.*, [1899] A. C. 392. For French Morocco the Orders in Council of 1889—1933 no longer apply, jurisdiction having been sacrificed by agreement with France of July 29, 1937, made effective by Order in Council of December 21, 1937 (S. R. & O., No. 1214, p. 806).

(s) Registration of British subjects is regularly required under the Order in Council: see, e.g., Kuwait Order in Council, 1935, Part VI. For Bahrein, see Orders in Council, August 12, 1913; April 1, 1922; February 20, 1924; March 18, 1937; for Maskat Orders in Council, February 3, 1915; April 1, 1922. The statements in Bentwich, *Privy Council Practice*, pp. 74 f., as to Persia and Siam are not now correct.

(t) Parl. Pap., Cmd. 5726.

## CHAPTER V.

## MANDATED TERRITORIES.

*The Principles Governing Mandates.*

**The Mandatory System.**—For the disposal of the territories occupied by allied forces in the war of 1914—18 a new system was evolved, that of entrusting the territories to suitable powers to exercise such measure of control as might serve the best interest of the people of the areas (*a*). Germany, therefore, was required to surrender certain territories under the treaty of peace, and in 1923 Turkey under the Treaty of Lausanne accepted the disposal made by the powers of her lost lands. The mandates were allocated by the allied and associated powers, and the instruments were approved by the Council of the League of Nations. The mandatory reports annually to the League, and the reports are examined by a Permanent Mandates Commission, a majority of whose members represent non-mandatory powers. The Commission has no executive power, but its reports may form the basis of action by the League Council or Assembly. Further, under the mandates any dispute between the mandatory and another member of the League of Nations relating to the interpretation or application of the provisions of the mandate which cannot be settled by negotiation shall be submitted to the Permanent Court of International Justice.

*The Types of Mandate.*—There are three forms of mandate. Type A covers the case of former parts of the Turkish Empire which need only administrative assistance until such time as they can stand alone. Type B includes parts of Central Africa to be administered by the mandatory under conditions which guarantee (1) freedom of conscience and religion, subject to the maintenance of public order and morals; (2) prohibition of the slave trade, the arms traffic, and the liquor traffic; (3) prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory; and (4) equal opportunities for the trade and commerce of other members of the League. Type C covers South West Africa and the South Pacific Islands which, owing to sparseness of population, small size, remoteness from civilisation or geographical contiguity to the territory of the mandatory, can best be administered as integral parts of the territory, subject to the safeguards for the natives above set out;

(*a*) League of Nations Covenant, Art. 22; J. Stoyanovsky, *La Théorie générale des Mandats Internationaux* (1925); Wheaton, *International Law* (ed. Keith), i, 105—109.

these are not assumed to include equality of trade opportunities. Alteration of the mandates requires the consent of the League Council, and no provision exists for revocation without the mandatory's assent.

It is, however, clear that a mandate can be revoked with such assent as in the case of Iraq, which was released in 1932, and of Lebanon and Syria, French mandates, both approved by the League Council, though the treaties of 1936 providing for freedom for those areas are still unratified and new negotiations are on foot. It is also clear that a mandate could be transferred with the assent of the League Council, the mandatory, and the other power, so that there is no insuperable international objection to the transfer of British mandates to Germany, though there are no doubt other reasons against the concession now formally pressed by Herr A. Hitler (*b*), who, on January 30, 1939, advanced an unanswerable case against blind refusal to restore the *spolia belli* of the allies.

### *The British Mandates.*

Mandates of all three types are assigned to the United Kingdom, Palestine and, up to 1932, Iraq (A); Tanganyika (B); and a portion of Togoland and the Cameroons (C).

**Iraq.**—Iraq never acquiesced in the normal mandatory system, but by treaty of October 10, 1922, was recognised by the United Kingdom as independent on conditions enabling the British Government to execute the mandate (*c*). On October 3, 1932, Iraq was admitted a member of the League of Nations and the mandate ceased. Iraq is allied by treaty of June 30, 1930 (*d*), to the United Kingdom, and has undertaken to permit the maintenance of British air force bases in her territory, under sole British jurisdiction, and to maintain a judicial system which secures equal justice to all foreigners, thus superseding the former extraterritorial rights of the European powers. There is an elaborate constitution (March, 1924) of limited monarchy with a nominated Senate of twenty members, and elected Chamber of Deputies (108 members), and safeguards for individual rights; international undertakings to secure minorities were given to the League before admission. Their lack of value was shown in 1933 by grave massacres of the Assyrian minority, whose position had not been properly safeguarded despite British promises and obligations; no real reparation was made, partly no doubt owing to King Faisal's sudden death, and nothing effective has been done to redeem British obligations. In October 30, 1936, a coup d'état destroyed the ministry, and, though constitutional rule has been restored, the future of constitutional rule and of minorities is uncertain. An agreement for transfer of the railways to Iraq ownership was reached on March 31, 1936.

(*b*) Keith, *Letters on Current Imperial and International Problems*, 1935—36, pp. 101—119; *The King, the Constitution, the Empire, and Foreign Affairs*, 1936—37, pp. 137 ff., 146 ff., 171 ff., 180 f.

(*c*) Parl. Paper, Cmd. 2370.

(*d*) Parl. Paper, Cmd. 3627 and 3675.

**Palestine.**—The mandate for Palestine is complicated by the necessity of including in it the execution of the British declaration of November 2, 1917, in favour of establishing in Palestine a national home for the Jewish people without prejudice to the civil and religious rights of the non-Jewish communities. This policy, which is interpreted by the Jews to mean the creation of a Jewish state at the expense of the Arabs, involves great difficulty of execution, especially as it is held by the Arab community to violate prior agreements with them. This view has the authority of the House of Lords, which in June, 1922, by sixty votes to twenty-nine accepted it against Lord Balfour; Lords Carson, Parmoor, Sumner voting in the majority. Moreover, inadequate control of immigration menaces the Arabs with degradation into a landless proletariat. It has accordingly been found impossible to set up a legislative council owing, in 1922—23, to mistaken Arab refusal of co-operation, and in 1935—36 to irrational Jewish hostility. The obvious risk to Arab welfare led in 1936 to riots, put down by a British division under legalised martial law (e), and a Royal Commission was sent out to report, with a view to a final declaration of British policy on a just basis (f). It reported in favour of partition, but this proved unacceptable on all sides, and though accepted by the British government was coldly received by the League Mandates Commission and the Council. A commission to inquire into details reported in 1938 in terms showing that partition was impossible, and in February, 1939, an assembly of representatives of the Arab States, of the Arabs of Palestine, and of Jewish claims was arranged. In the meantime large British forces were sent to Palestine, and an extreme form of martial law was exercised, with destruction of property regardless of innocence and involving the killing of innocent prisoners, proceedings wholly incompatible with the terms of the mandate and based on the ultimately disastrous methods of repression in Ireland in 1920—21. The Arab delegation on February 10, 1939, advanced a cogent plea for abrogation of the mandate while safeguarding Jewish settlers. The government therefore rests with a High Commissioner aided by an Executive Council; he legislates, but usually consults an official advisory council. There is an elaborate system of civil and religious courts, and appeal lies to the Privy Council (g). Since 1927 the Jewish community has been organised with a Chief Rabbinate, an Elected Assembly, and a General Council, which represents the community in its dealings with the government; it has internal autonomy in matters religious, cultural and communal. The Muhammadan community has a Supreme Moslem Council to control charitable foundations. The constitution rests on Order in

(e) Palestine (Defence) Order in Council, July 23, 1931; March 18, 1937; Palestine Martial Law (Defence) Order in Council, September 26, 1936.

(f) Parl. Paper, Cmd. 1889. See also Cmd. 3530, 3582, 3686, 3687, 3692 (1930). For the Royal Commission, see Cmd. 5479, 5513 (1937); the partition commission, Cmd. 5854, 5893.

(g) Order in Council, August 10, 1922, Art. 44; for administration, see also Orders, May 4, 1923; February 7, 1933; February 21, 1935; Royal Instructions, January 1, 1932; for appeals, October 9, 1924; Admiralty jurisdiction, Order in Council, February 2, 1937.

Council under the Foreign Jurisdiction Act (*h*), and embodies the terms of the mandate, but the Privy Council has ruled that the local government has a wide discretion and can expropriate by Ordinance Arab water rights (*i*). English, Hebrew and Arabic are the official languages.

**Trans-Jordan.**—This territory is treated as exempt from the pledge as to a Jewish home; the British government is responsible as mandatory, and its relations with the Amir rest on a treaty of February 20, 1928, revised by another of June 2, 1934. There is a constitution of 1928, providing for local administration with a legislative council of six officials and sixteen elected members; the British Resident who, acting for the High Commissioner for Trans-Jordan, advises the administration, is aided by judicial and financial officers (*k*). The defence of the territory and of Palestine rests since 1926 with the Trans-Jordan Frontier Force, which is solely in Trans-Jordan under British jurisdiction.

**Tanganyika Territory.**—This territory, under mandate of July 20, 1922 (*l*), is held subject to the general obligations, and also to security for native land rights, to prohibition of monopolies and the necessity of non-discrimination in the grant of concessions. By its constitution (*m*) the Governor has an executive council, and a nominated legislative council with thirteen *ex officio* members and ten unofficial members; the mandate permits the creation of the territory into a customs, fiscal and administrative union with adjacent territories, but this process has raised local and international difficulties and is in abeyance, though it has the same tariff and postal system as Kenya and Uganda, and shares in the protection of the King's African Rifles (*n*). Appeal lies to the Eastern African Court of Appeal (*o*).

**The Cameroons under British Mandate.**—This territory as allocated to the United Kingdom is administered as part of Nigeria (*p*), the southern part being treated as part of the Southern Provinces of the Protectorate, the northern as part of the Northern Provinces. The law of Nigeria applies in general, modified where necessary to suit the mandate (*q*).

(*h*) Order in Council, August 10, 1922. Currency (February 7, 1927), citizenship (July 24, 1925; July 23, 1931), and holy places (August 1, 1924, May 19, 1931) are also provided for thus.

(*i*) *Jerusalem and Jaffa District Governor v. Suleiman Murra*, [1926] A. C. 321.

(*k*) Parl. Paper, Cmd. 1735 (1922); 3488 (1930); 4999 (1935). The High Commissioner for Palestine acts also for Trans-Jordan. The Amir may appoint consuls in adjacent Arab territories; there can be no customs barrier save by agreement between Trans-Jordan and Palestine.

(*l*) Parl. Papers, Cmd. 1794, 1974 (1923).

(*m*) Orders in Council, July 22, 1920; March 19, 1926; March 29, 1935; October 22, 1937; Royal Instructions, August 31, 1920; August 25, 1926; November 3, 1937.

(*n*) See p. 544, *ante*.

(*o*) See p. 556, *ante*.

(*p*) Order in Council, June 26, 1923; March 17, 1932; Nigerian Ordinance No. 3 of 1924.

(*q*) Parl. Papers, Cmd. 1350 (1921); 1794 (1923).

**Togoland under British Mandate.**—In like manner the British portion (*r*) of Togoland is administered (*s*) as regards the northern section as part of the Northern Territories of the Gold Coast, as regards the southern section as part of the colony. The Governor of the colony can legislate for any part of the territory. Appeal lies to the West African Court of Appeal (*t*) from the Supreme Court of the Gold Coast, which has now jurisdiction over the territory.

*The Dominion Mandates.*

All the Dominion mandates are of C type, Western Samoa in the control of New Zealand, New Guinea of the Commonwealth of Australia, and South-West Africa of the Union of South Africa.

**Western Samoa.**—New Zealand obtained for the administration an Order in Council under the Foreign Jurisdiction Act, 1890 (*u*), which authorises the executive and Parliament of the Dominion to exercise full control. Under this authority administration is carried on by an administrator appointed by the Governor-General and responsible to the Minister for External Affairs. There is a legislative council of from four to six officials, two elected Europeans, and two native Samoans appointed by the Governor-General; all legislation is subject to disallowance by the Governor-General; appeal lies from the High Court to the Supreme Court of New Zealand, and thence no doubt to the Privy Council (*x*). The Supreme Court has also jurisdiction over Samoa.

**New Guinea.**—Under the mandate (*y*) New Guinea is controlled by an Administrator aided by an Executive Council, and a Legislative Council, including nominated non-officials. Prior to 1933 legislation was passed by the Governor-General of the Commonwealth in Council (*z*). The territory is only partially under effective control.

**South-West Africa.**—Under the mandate (*a*) the Union Parliament has claimed such a measure of sovereign authority that Parliament can legislate for the area without Imperial authority, and that revolt incurs the penalties of the crime of *majestas* (*b*). On the other hand

(*r*) Parl. Papers, Cmd. 1350, 1794.

(*s*) Order in Council, October 11, 1923; March 17, 1932; November 9, 1934.

(*t*) See p. 556, *ante*.

(*u*) Orders in Council, March 11, November 9, 1920; Mandate, Parl. Paper, Cmd. 1203; Samoa Act, 1921, amended in 1926 and 1927. See p. 571, note (*b*), *post*.

(*x*) Cf. *Nelson v. R.*, [1928] W. N. 197; Keith, Journ. Comp. Leg., xvi, 296.

(*y*) Parl. Paper, Cmd. 1201 (1921).

(*z*) The power exists either under the Treaty of Peace Act, 1919 (9 & 10 Geo. V. c. 33), as held by Isaacs, J., in *Mainka v. Custodian of Expropriated Property* (1924), 34 Commonwealth L. R. 297, or s. 122 of the Commonwealth Constitution: see Dixon, J., *Jolley v. Mainka* (1933), 49 C. L. R. 242, 256; Starkie, J., at p. 252; for inherent sovereignty, Evatt, J., at pp. 290—291; but this is dubious. The issue is discussed fully in *Efrost v. Stevenson* (1937), 58 Commonwealth L. R. 528; Keith, Journ. Soc. Comp. Leg., xxi. See New Guinea Acts, 1920—32, of the Commonwealth. Appeal lies to the High Court of Australia. (*a*) Parl. Paper, Cmd. 1204 (1921).

(*b*) *R. v. Christian*, [1924] A. D. 101 (Supreme Court of Union). Like views as to sovereign power, apart from the Order in Council, have been held in New Zealand: *Tagaloo v. Inspector of Police*, [1927] N. Z. L. R. 883; *Tamasuse, In re*, [1929] N. Z. L. R. 209; *Nelson v. Brailsby*, [1934] N. Z. L. R. 559.

claim of sovereignty in a boundary treaty with Portugal and of dominion over the railways and harbours of the territory was criticised by the Permanent Mandates Commission, and in 1930 the Union altered its railway Act accordingly. The normal conditions of a mandated territory are absent in this case, as there is a large European population, partly German in origin, which has been naturalized in 1924 with the assent, in 1923, of Germany, and native interests are necessarily postponed to their welfare. A wide measure of autonomy has been conceded (c). In 1935—36 agitation in the German elements of the population for ultimate autonomy with a view to union with Germany led to political unrest, as the British elements asked for incorporation in the Union, and Germany began to suggest transfer of the mandate. Investigation by a Commission was inconclusive; in 1937 General Hertzog announced (1) that the mandate would not be converted into annexation; (2) that agitation by Nazi elements would be suppressed; and (3) that he hoped on termination of the mandate the territory would join the Union with Germany's assent. Apparently he admits that the mandate only lasts until the European population can stand alone (d). Strong protest was made by the German Minister at Cape Town against the unfair treatment of Germans under the Proclamation in April, and was replied to vigorously in Parliament. Significantly at the same time the Minister of Defence asserted the Union's intention to maintain the agreement of 1921 for the defence on the land side of the Imperial naval base at Simonstown. The Administration rests with an Administrator with four members elected by the Legislative Assembly, forming an Executive Committee as in the provinces; the Assembly of eighteen, two-thirds elective, has general power save as to immigration, customs, native affairs, mining, military forces, the public service, railways and harbour administration, posts, telegraphs, and telephones, currency, banking, &c., and the Courts. The administrator may also legislate and the Governor-General in Council, the latter with paramount authority, and bills passed by the legislation are subject to reservation and disallowance. Roman-Dutch law is now in force, and appeal lies from the High Court to the Appellate Division in the Union.

#### *British Empire Mandate.*

**Nauru.**—This island surrendered by Germany in 1914 and relinquished by the Treaty of Versailles, 1919, was allocated in mandate (e) to the British Empire. Its phosphate resources, which were duly obtained by purchase from their private owners, at joint cost, are exploited under an agreement between the United Kingdom, Australia, and New Zealand of July 2, 1919, and an amending agreement of May 30, 1923. Administration is provided for by the agreement confirmed by the Nauru Island Agreement Act, 1920, and Acts

(c) Union Acts, No. 42 of 1925; No. 38 of 1931.

(d) Keith, *Journ. Comp. Leg.*, xviii, 286; *The King, the Constitution, the Empire, and Foreign Affairs*, 1936—37, pp. 85 ff., 148, 181.

(e) *Parl. Paper*, Cmd. 1202 (1921).

of Australia and New Zealand. The Administrator is appointed for five-year periods by the government agreed on; his business is to secure the moral and social welfare, the observance of proper labour conditions and the health of the people, he has full executive and legislative power, subject to control by that government. The Commonwealth of Australia (f) was given control by agreement, which has been periodically renewed. The phosphate deposits are exploited by the British Phosphate Commission for the governments, but the administration secures to the satisfaction of the League of Nations the welfare of the inhabitants, the number of whom has increased rapidly.

(f) See the Commonwealth Nauru Island Agreement Acts, 1919 and 1932.

## CHAPTER VI.

## THE INDIAN EMPIRE.

LEGALLY, the expression India means "British India," together with all territories of any Indian ruler under the suzerainty of His Majesty, all territories under the suzerainty of such an Indian ruler, the tribal areas, and any other territories which His Majesty in Council may include from time to time, after ascertaining the views of the Federal Government and the Federal Legislature (a). British India means all territories for the time being comprised within the governors' provinces and the chief commissioners' provinces (b).

The tribal areas are the areas along the frontiers of India or in Baluchistan, which are not part of British India or of Burma, or of any Indian state or of any foreign state. In effect they are areas within the international frontiers of India which are not included in the administered areas, nor treated as states. An Indian state includes any territory, whether state, estate, jagir or otherwise, belonging to or under the suzerainty of a ruler (prince, chief, or other person) under the suzerainty of His Majesty and not part of British India. It rests, of course, with the Crown to decide what is or is not a state, and it has even exercised the power to recognise as a state (that of Benares in 1910) territories which were owned by right of conquest by the King.

**History of British Sovereignty.**—The history of British sovereignty in India is briefly as follows:—In the year 1600 Elizabeth granted a charter to the merchants trading to the East Indies, by which they were incorporated as the "Governor and Company of Merchants of London trading into the East Indies," and were to enjoy certain trading privileges to the exclusion of all other persons. Strong opposition arose, and in 1694 the House of Commons passed a resolution to the effect that "all subjects of England have equal rights to trade to the East Indies unless prohibited by Act of Parliament" (c). The exclusive right of trading was, however, placed upon a statutory basis in 1698 (d), when a new charter was granted to a rival company, the English Company trading to the East Indies, and under the Act of that year and subsequent Acts successive charters continued to be granted to

(a) Government of India Act, 1935 (26 Geo. V. & 1 Edw. VIII. c. 2), s. 311. For this chapter, see Keith, *Const. Hist of India, 1600—1935* (2nd ed., 1937).

(b) *Ib.*

(c) *Parl. Hist.*, v, 828. The right of the Crown to grant exclusive trading privileges had previously come before the Courts in 1683, in the case of the *East India Company v. Sandys*, known as the great case of Monopolies (1685), 10 St. Tr. 371, and held good by the judges. See p. 205, *ante*.

(d) 9 & 10 Will. III. c. 44.

the company (e), with which the London company was amalgamated in 1709.

In the year 1813 Indian trade, except that with China and the trade in tea, was thrown open to the public (f), and in 1833 the company was forbidden by statute to transact commercial business of any kind (g). The government of India, however, remained in the hands of the company, the office of governor-general and the governor-general's council being constituted in 1773, whilst the home management was carried on by a Court of directors. The control of the British Government was, under Pitt's Act in 1784, exercised by the Board of Control, whose powers were in fact vested in the President, a member of the government.

In 1853 the Indian Civil Service was thrown open to competition, and in 1858 (the year after the Mutiny) the Crown assumed the government of the country by an Act for the better government of India passed in that year (h). In 1861 an Act was passed enabling the Crown to erect new High Courts for the various provinces, to take the place of the old Supreme and Sadr Courts (i), which exercised final jurisdiction as royal and company Courts respectively, and in 1876—77 the title of "Empress of India" was assumed by Queen Victoria under statutory authority (k).

**Indian Government up to 1919.**—The system of government established in 1858 vested all power over India in the Secretary of State in Council. Supreme control in India was exercised by the governor-general in council; the Presidencies (Madras, Bombay, and from 1912, Bengal) were under governors with executive councils; the provinces (in 1912, United Provinces, Punjab, Burma, Bihar, and Orissa) under lieutenant-governors (only Bihar and Orissa having an executive council), and minor territories had chief commissioners. Legislative power in all cases belonged to the Indian Legislative Council; in 1861 (l) legislative councils were created for Madras and Bombay, and given later to Bengal (1862), United Provinces (1886), Punjab (1897), Burma (1897), Assam (1912), and the Central Provinces (1913); their powers were subject to strict control by the governor-general and the Secretary of State, and all subjects of general interest were dealt with by the central legislature, though there was no federal division of powers. Financial control was rigid; a single Indian budget existed; the Secretary of State had to authorise all financial measures, and the provinces were not financially autonomous, being allowed only a limited discretion in expenditure—slightly greater in the case of Bombay and Madras on historical grounds—and receiving allocations of revenue from the central government.

**The Morley-Minto Reforms.**—No power save of legislation was granted to the legislatures, which in every case consisted of the head

(e) From 1707 to 1833 the company bore the name of "The United Company of Merchants trading to the East Indies." In the latter year the name was changed to "The East India Company" by 3 & 4 Will. IV. c. 85, s. 111.

(f) 53 Geo. III. c. 155, ss. 2, 3.

(h) 21 & 22 Vict. c. 106.

(k) 39 Vict. c. 10; Procl., April 28, 1876.

(g) 3 & 4 Will. IV. c. 85, ss. 3, 4.

(i) 24 & 25 Vict. c. 104.

(l) 24 & 25 Vict. c. 67.

of the government, his executive council (if any), and additional nominated members, some of whom might be non-officials. In 1892 the Councils were enlarged and permission was given to nominate person suggested by selected bodies; the councils were allowed to discuss the annual financial statement, and questions might be asked, but no resolutions could be moved (*m*). The Morley-Minto reforms of 1909 (*n*) permitted of election of a minority of the councils, now further enlarged, and authorised the passing of resolutions on the budget and general matters. Indians were now placed on the executive councils in India and on the Secretary of State's council. There was, however, no idea on the part of these statesmen of introducing Parliamentary government with the control of the executive by the legislature, but merely of securing, as against growing anarchic conspiracy, the co-operation of the aristocracy, wealth, and intelligence of India in the executive and legislative government.

**The Montagu-Chelmsford Reforms.**—The war of 1914–18 proved the loyalty of India, and evoked the sense of Indian nationality, and demands for self-determination. The demand was conceded; on August 20, 1917, Mr. Montagu announced the policy of “the gradual development of self-governing institutions with a view to the progressive realisation of responsible government in India as an integral part of the British Empire.”

Mr. Montagu visited India and with Lord Chelmsford drew up a scheme of reform, which, after examination by a Joint Select Committee of Parliament, was enacted as the Government of India Act, 1919 (*o*).

**The Secretary of State in Council.**—The supreme control of Indian affairs was left to the Secretary of State, but in matters which under the reforms are placed under the control of Ministers he was empowered to divest himself of responsibility (*p*). Normally he acted with the concurrence of his Council, but could override it, except in matters of expenditure of revenue and certain matters affecting the Indian Civil Service. The Council consisted of from eight to twelve members, of whom a half must have resided ten years in India and not have left it more than five years before appointment; the term of office was five years, which might be extended on special grounds to ten (*q*). The salary of the Secretary of State and part of the expenses of his department were under the reform scheme transferred to the British from the Indian exchequer.

**The Governor-General in Council.**—In India the Governor-General, or Viceroy, was and still is appointed by the Crown under the sign manual (*r*), the signet being affixed also on the advice of the Prime

(*m*) 55 & 56 Vict. c. 14.

(*o*) 9 & 10 Geo. V. c. 101. For the report, see Parl. Pap., Cmd. 9005.

(*p*) *Ib.* s. 33.

(*n*) 9 Edw. VII. c. 4.

(*q*) *Ib.* s. 31.

(*r*) 5 & 6 Geo. V. c. 61, s. 34. The Act was reprinted as amended to date as the Government of India Act. See now 26 Geo. V. & 1 Edw. VIII. c. 2, s. 3. The term viceroy is ceremonial: it is not—as was proposed—to be used to describe the governor-general in his capacity as His Majesty's representative for the exercise of the functions of the Crown in its relations with Indian states, which he holds by another commission. There are separate Letters Patent for the two offices, March 5, 1937.

Minister, and usually holds office for five years. The superintendence, direction, and control of the civil and military government and revenues were vested in the Governor-General in Council (*s*), save as regards matters under Ministerial control in the provinces (*t*). The following description of his former position is still in part applicable to the transition period before federation is made effective, the date for that being still uncertain, while provincial autonomy was established from April 1, 1937. The central government necessarily changes its power, for it can no longer intervene in subjects definitely provincial, but so far as practicable the *status quo* remains. There is no responsibility to the legislature, it being held essential that, pending federation, the central government should have unfettered power in view of the financial and military problems of India. The members of the executive council of the Governor-General, seven in number (*u*), are appointed by His Majesty by warrant under the royal sign manual (*x*). The term of office for ordinary members of the council is fixed by custom at five years. The council meets to discuss matters of public policy as the Cabinet does in England, but under the presidency of the Governor-General; he can regulate business (*y*), and thus combines the work of a Sovereign and a prime minister. It serves also to perform formal executive acts, and to prepare measures for enactment by the legislature. In cases where the safety, tranquillity, or interest of the British possessions in India is concerned, the viceroy can act in opposition to his council (*z*). The administration is carried on in India by various departments, each of which is controlled by a permanent secretary under the supervision of one of the members of the viceroy's executive council, the viceroy himself supervising the conduct of external affairs and the political department which is concerned with the arrangement for federation (*a*). The Commander-in-Chief controls not only army headquarters, but also the army department (*b*). The other departments are Home Affairs; Finance; Law; Commerce and Labour; Education, Health and Lands; and Communications; and the offices are usually equally divided between Indians and Europeans.

(*s*) 5 & 6 Geo. V. c. 61, s. 33.

(*t*) 9 & 10 Geo. V. c. 101, s. 1 (3). The authority during the transitional period refers to federal subjects as defined in the Act; to exercise of authority in the tribal areas; and to raising forces in British India and the control of His Majesty's forces on the Indian establishment: 26 Geo. V. c. 2, s. 312.

(*u*) The former limit of six members was removed: *ib.* Sched. II. Part II. The term executive council will not appear in the federation, being replaced by council of ministers, in the federal as now in the provincial governments: 26 Geo. V. & 1 Edw. VIII. c. 2, ss. 9 and 50.

(*x*) 5 & 6 Geo. V. c. 61, s. 36; continued 26 Geo. V. & 1 Edw. VIII. c. 2, Sched. 9, s. 36.

(*y*) 5 & 6 Geo. V. c. 61, s. 40; 26 Geo. V. & 1 Edw. VIII. c. 2, Sched. 9, s. 40.

(*z*) 5 & 6 Geo. V. c. 61, s. 41; 26 Geo. V. & 1 Edw. VIII. c. 2, Sched. 9, s. 41.

(*a*) The governor-general controls relations with the Indian States as well as with frontier foreign territories, the governor-general being authorised to enter into relations with the government of such territories. There are also the agent to the governor-general, Khorasan, the consul-general, Kashgar, and the agent in South Africa, the political resident in the Persian Gulf, and the political agents at Bahrein, Kuwait and Maskat, who are in communication with the Indian Government.

(*b*) 5 & 6 Geo. V. c. 61, s. 37, as amended by 9 & 10 Geo. V. c. 101.

**The Indian Legislature.**—This body consists of the governor-general and two chambers, namely, the Council of State and the Legislative Assembly (*c*). The Council of State consists of a maximum of sixty members, of whom not more than twenty are official members, and thirty-four are elected; it continues for five years (*d*). The Legislative Assembly consists of 141 members, the number of non-elected members being thirty-nine, of whom twenty-six are official members; it continues three years (*e*). Either chamber may be dissolved or its sessions prorogued by the governor-general (*f*). The power of the Indian Legislature to enact laws is subject to certain restrictions; and it was not lawful without the previous sanction of the governor-general to introduce into either chamber any measure relating to revenue, religion, army or naval discipline, foreign policy, provincial and some other matters (*g*).

When a law or regulation has been passed by the council three courses are open to the governor-general: (1) he may assent, when the enactment becomes law; (2) he may refuse his assent, when the measure is lost; (3) he may reserve his assent for the signification of His Majesty's pleasure thereon, in which case the measure does not become law until His Majesty's assent has been signified (*h*). The Crown may disallow any Act (*i*).

The Indian Legislature can make laws and regulations for the whole of British India; for all British subjects and servants of His Majesty resident in other parts of India; for all Indian subjects of His Majesty without and beyond as well as within Indian territory, and for the defence forces of India (*k*). But the powers of the Indian Legislature "are limited by the Act which created it, and it can do nothing beyond the limits which circumscribe these powers. When acting, however, within these limits its powers are plenary and as large as those of Parliament itself" (*l*).

The governor-general may, if he thinks it necessary for the safety, tranquillity or interests of British India, pass any Act on his own authority, even if both Houses dissent. Such an Act normally takes effect only after assent by the King in Council (*m*). He can also legislate by Ordinance of six months' duration on any subject in case of emergency, *e.g.*, against insurrection or unrest (*n*). The governor-

(*c*) 9 & 10 Geo. V. c. 101, s. 17; 26 Geo. V. & 1 Edw. VIII. c. 2, Sched. 9, s. 63.

(*d*) 9 & 10 Geo. V. c. 101, ss. 18, 21. The governor-general may extend this period for either House. See 26 Geo. V. & 1 Edw. VIII. c. 2, Sched. 9, s. 63A.

(*e*) 9 & 10 Geo. V. c. 101, ss. 19, 21; 26 Geo. V. & 1 Edw. VIII. c. 2, Sched. 9, s. 63B.

(*f*) 9 & 10 Geo. V. c. 101, s. 21; 26 Geo. V. & 1 Edw. VIII. c. 2, Sched. 9, s. 63D.

(*g*) 9 & 10 Geo. V. c. 101, s. 27, extending 5 & 6 Geo. V. c. 61, s. 67 (2). Under 26 Geo. V. c. 2, Sched. 9, these provisions are not continued under the present regime.

(*h*) 5 & 6 Geo. V. c. 61, s. 68; 26 Geo. V. c. 2, Sched. 9, s. 68.

(*i*) 5 & 6 Geo. V. c. 61, s. 69; 26 Geo. V. c. 2, Sched. 9, s. 69.

(*k*) 5 & 6 Geo. V. c. 61, ss. 65, 66; Army Act, s. 173; Air Force Act, s. 173. Under 26 Geo. V. c. 2, s. 99 (2), a like power is given, extended to British subjects domiciled in India, wherever they may be, to persons on and to ships or aircraft registered in India, and to members of the defence forces and followers anywhere.

(*l*) See *R. v. Burah* (1878), 3 App. Cas. 889.

(*m*) 9 & 10 Geo. V. c. 101, s. 26; 26 Geo. V. c. 2, s. 67B of Sched. 9.

(*n*) 5 & 6 Geo. V. c. 61, s. 72; 26 Geo. V. c. 2, Sched. 9, s. 72. On his sole discretion as to the existence of emergency and the proper measures to meet it, see *Bhagat Singh v. King-Emperor* (1931), L. R. 58 Ind. App. 169.

general in council could also legislate for particular areas in any local government on the recommendation of that administration (*o*).

In finance the legislature cannot deal with expenditure (1) for loan charges; (2) provided for by law; (3) for salaries of officers appointed under the authority of the home administration; (4) classed as political, defence, and ecclesiastical. In other cases demands require normally the approval of both houses, but the governor-general may restore any demand refused or reduced, if he holds it necessary for the execution of his responsibilities, and may also spend any money necessary for the safety or tranquillity of British India (*p*).

**Central Subjects.**—While there was under the Act of 1919 no absolute exclusion of the central legislature from any part of the legislative sphere, certain subjects were definitely marked out as central, including defence, external relations, relations with the Indian states, political changes, main communications, shipping and navigation with its adjuncts, posts, telegraphs, customs, currency, civil law, criminal law, copyright, commerce, trading companies, opium, geological, botanical, and zoological surveys, meteorology, archæology, and statistics. Sources of central revenue were income tax, cotton excise duties, customs, salt, opium, railways, posts and telegraphs (*q*). Under the new regime this division of heads of legislation and finance remains largely effective. By a constitutional convention the British Government accepts the views of the government when it agrees with the legislature on customs issues.

**Dyarchy in the Provinces.**—The most important part—now repealed—of the reforms was the introduction of a measure of responsibility in the provinces. Of the total of provincial subjects part was assigned to the control of the governor in council, reserved subjects; part to the governor acting on the advice of a Minister or Ministers, transferred subjects. Reserved subjects included land revenue administration, irrigation and water supplies, famine relief, land acquisition, administration of justice, stamps, factories, labour disputes, ports, inland waterways, police, coroners, excluded areas, criminal tribes, elections, audit, control of revenue, &c. Transferred subjects included agriculture, fisheries, civil veterinary matters, forests (in Bombay and Burma), co-operative societies, local self-government, medical and public health administration, education (other than European and Anglo-Indian), libraries, excise, registration of deeds, births, deaths and marriages, religious endowments, development of industries, stores and stationery, adulteration of food-stuffs, weights and measures. These subjects form the basis of the present provincial powers.

The provinces were accorded power to raise taxes on non-agricultural land, successions, betting, advertisements, amusements,

(*o*) 5 & 6 Geo. V. c. 61, s. 71; the power is not now necessary and is omitted.

(*p*) 9 & 10 Geo. V. c. 101, s. 25. Under 26 Geo. V. c. 2, Sched. 9, s. 67A, head (4) ranks as ecclesiastical, external affairs, defence or relating to tribal areas.

(*q*) These matters were provided for under the Devolution Rules, first issued in 1920 and repeatedly amended later. All rules were subject to control by both Houses of Parliament: 9 & 10 Geo. V. c. 101, s. 44.

luxuries, registration, and stamp duties. They had also land, forest, and irrigation revenue, and excises, and were given a share of income tax; these arrangements also have persisted under the new regime.

**The Provincial Executives.**—For each presidency and province, to which the North-West Frontier Province was added in 1932, there was a governor with an executive council (four in the presidencies, three or two elsewhere, with two or one Indian members), and two or more Ministers (*r*). The governor could overrule his council, and could act against the advice of Ministers, if he thought necessary. The allocation of funds between the two sides of the government was finally made by the governor in case of disagreement. If the governor could not obtain Ministers who could command a majority in the legislature, he could assume the administration of the transferred departments (*s*). This step had occasionally to be taken owing to deadlocks.

The unit of administration still is in general the district under a collector-magistrate or deputy commissioner, who has a general supervision of administration. In most cases districts are grouped in divisions under a commissioner.

**The Provincial Legislatures.**—There was a legislative council in every governor's province, which consisted of the members of the executive council and of members nominated or elected, not more than twenty per cent. being official members and at least seventy per cent. (in Burma sixty per cent.) being elected members (*t*). Every governor's legislative council continued for three years, but might be dissolved sooner by the governor (*u*). The local legislature of any province might make laws for the good government of the province, subject in certain cases to the previous sanction of the governor-general (*v*). Expenditure was (*w*) presented in the form of demands, save in respect of loan interest, expenditure provided in laws, certain judicial and official salaries. The governor, however, might restore any demand for a reserved subject if essential for the discharge of his responsibility, and in emergency authorise any expenditure for the service even of transferred departments or the safety and tranquillity of the province. He might also pass over the head of the legislature any bill in respect of a reserved subject (*x*), and might forbid further proceedings on any bill (*y*).

The governor might refuse assent, assent to, or reserve any bill. The governor-general could then assent or refuse assent, or further reserve it for the consideration of the Crown, which might assent in council. Any Act might be disallowed by the King in Council (*z*).

By reason of a number of circumstances the system of ministerial responsibility in practice worked ineffectively; in large measure the

(*r*) 9 & 10 Geo. V. c. 101, ss. 3—6.

(*s*) With the assent of the Secretary of State: *ib.* s. 1 (2).

(*t*) 9 & 10 Geo. V. c. 101, s. 7.

(*u*) *Ib.* s. 8. It could also be extended without limit under 23 & 24 Geo. V. c. 23, s. 1.

(*v*) Act of 1919, s. 10.

(*x*) *Ib.* s. 13.

(*z*) *Ib.* s. 12.

(*w*) *Ib.* s. 11.

(*y*) *Ib.* s. 11 (4).

governor came to dominate ministerial policy, partly because finance was mainly under his control in council, partly because the official bloc was so large that it could normally keep a ministry friendly to it in office.

**The Chief Commissionerships.**—Each of the provinces known as British Baluchistan, Delhi, signalled out from 1912 as the seat of government, and so given a special status, Ajmere-Merwara, Coorg, and the Andaman and Nicobar Islands was administered by a chief commissioner (*a*). Coorg had a legislature with limited powers.

**Proposals for further Reforms.**—Indian unrest resulted in concession; the ten years' period provided in the Act of 1919 for the appointment of a commission to inquire into the working of the reforms was anticipated by the appointment of a Commission under Sir John Simon in 1927, and it reported in 1930 (*b*). But demands by the Indian National Congress and other bodies for reforms were far from satisfied by its recommendation of responsible government in the provinces, but the retention of full central control, and a new element arose in the readiness of certain princes to enter a federation if responsible government were extended to the centre. Their motives were (1) to obtain control—hitherto wholly lacking—over Indian fiscal and railway policy, defence, &c. proportionate to their resources, and (2) to avoid the interference with their autonomy in local issues, which might be feared if the Crown handed over to a responsible government in India its paramountcy over the states. Their terms were therefore extended to secure a virtual immunity from British control in their domestic affairs, while giving Britain conservative elements in the central legislature, which would counteract any democratic tendencies and so render it possible to concede responsibility in appearance at least. British Indian politicians at first welcomed the attitude of the princes under the delusion that they were actuated by patriotic ideals and would establish democracy in their states. The British Government therefore convened a Round Table Conference representing most aspects of Indian opinion; it held in 1930—32 three sessions (*c*). On the basis of its results a scheme of reforms was matured by the British Government in 1933, and submitted to a Joint Select Committee of Parliament, which was assisted in taking evidence by an Indian delegation (*d*). Ultimately, after steady opposition, there became law the Government of India Act, 1935 (25 & 26 Geo. V., c. 42), which for convenience was reprinted, under 26 Geo. V. c. 1, as the Government of India Act, 1935 (26 Geo. V. & 1 Edw. VIII. c. 2), and the Government of Burma Act, 1935 (26 Geo. V. & 1 Edw. VIII. c. 3).

**The Federation.**—The Act contemplates that the Indian States and British India shall form a federation in which a definition of powers shall exist as between the federation and the units. The creation is

(*a*) 5 & 6 Geo. V. c. 61, s. 58.

(*b*) Parl. Papers, Cmd. 3568, 3569.

(*c*) Parl. Papers, Cmd. 3778, 3972, 3997, 4238.

(*d*) Parl. Paper, Cmd. 4268; H. C. 5, 1933—34.

dependent on accession by states representing not less than half of the population of the states and half of the seats allocated in the council of state (e). In the federation there will be responsible government with two chambers, the upper being composed of state representatives, 100 appointed by rulers, four by the governor-general, and 156 representing the provinces, six nominated by the governor-general, 150 elected either in territorial constituencies, general (seventy-five), Sikh (four), Muhammadan (forty-nine), or special constituencies for the Anglo-Indian, European and Indo-Christian communities; six seats each are given to women and members of the scheduled castes (*i.e.*, the depressed classes of Hindus). The House of Assembly consists of 125 representatives of the states, and 250 of the provinces, who represent general seats, scheduled castes, Sikhs, Muhammadans, Anglo-Indians, Europeans, Indian Christians, commerce and industry, landholders, labour, and women. They are elected by the members of the provincial legislatures in varied constituencies. The two houses are to have in general equal powers, but demands for supply votes and financial bills must originate in the lower house. Deadlocks can be solved by joint sessions, which can be held in the same session of the legislature in the case of finance (f).

**Responsible Government.**—There will be responsible government in the main, with not over ten ministers, who lose office if for six months successively not members of one or other house of the legislature. The governor-general's relations with them are to be defined by an Instrument of Instructions approved by both Houses of Parliament. The governor-general, the governors and the Secretary of State are all exempt from process in India for any personal or official action, nor may proceedings be taken after the termination of their office save with the assent of the King in Council. Such exemption is novel. From ministerial control will be reserved external affairs (g), defence, ecclesiastical administration and the tribal areas; the governor-general will appoint three counsellors with *ex officio* membership of both houses, without the right to vote, for these departments, and will retain final responsibility, though ministers will be invited to deliberate with the counsellors. In other matters the governor-general will normally act on ministerial advice, but will be entitled to act independently in matters entrusted to his special responsibility. These include the prevention of grave menace to India or any part thereof; the safeguarding of the financial stability and credit of the federation, of the interests of minorities, of those of the public services and of the rights of the states and their rulers; the prevention in the executive sphere of action hostile to British or Burman interests forbidden in the sphere of legislation; the prevention of discriminatory or penal treatment of goods of British or Burmese origin; and matters appertaining to reserved matters. The governor-general will have full powers to legislate

(e) Government of India Act, 1935, s. 3.

(f) *Ib.* Part II., Sched. 1.

(g) Excluding relations with other parts of the Empire. These reserved issues are to be dealt with in his discretion, which enables him to ignore ministers or invite their views, but to decide for himself.

either in respect of a reserved subject or a special responsibility, either by a temporary Ordinance or a permanent Act; he may also issue temporary Ordinances on advice of ministers, and he may provide for supply so far as he deems it essential. He may also exercise plenary authority in the event of a breakdown of the Constitution, but subject to Parliamentary approval and not for longer than three years (*h*).

To safeguard finance the governor-general may appoint a financial adviser, and a Reserve Bank has been created to deal with financial issues, including exchange operations (*i*). The governor-general exercises an important control in its functioning, and legislation affecting it requires prior sanction. He has also special authority as to broadcasting and disputes as to water rights, while a Federal Railway Authority and a Railway Tribunal take over charge of these contentious problems (*k*). The ambit of responsible government is greatly reduced by the fact that only a small part of the expenditure will be subject to ministerial authority. Audit is entrusted to an independent auditor-general, whose duties are prescribed by the King in Council. The funds for debt services, certain salaries and pensions, and expenditure for the reserved departments, will not be voted but may be discussed.

**The Provinces.—Responsible Government.**—The provinces are increased to eleven by adding Sind and Orissa, and by agreement of 1936 with the Nizam of Hyderabad, Berar is to be administered with the Central Provinces, though no change of formal sovereignty is involved (*l*). Responsible government is provided for, but special responsibilities are given to the governor on similar lines to those of the governor-general, save as regards finance; he must also secure the execution of orders given by the governor-general under his special responsibilities. Certain excluded areas in the provinces will be placed under the governor's sole control, others partially excluded under ministers, but with a special responsibility for their control; for both he can make regulations. He will have to take special care to secure the satisfactory administration of the police, approving all changes in rules respecting them, the proposal to refuse authority over the police to ministers having been rejected as inconsistent with the reality of responsible government. He may, to combat crimes of violence intended to overthrow the government, assume power over police in his discretion. He may forbid disclosure to ministers of sources of information as to crime. He appoints and controls the advocate-general (*m*). He has power to legislate to give effect to his special responsibilities by temporary Ordinance or Act, and at ministerial request by temporary Ordinance, and in the case of a breakdown he may by proclamation assume all powers he thinks fit. In all actions outside ministerial responsibility he is subject to control

(*h*) Government of India Act, 1935, s. 45.

(*i*) Legislation for this purpose was passed by the Assembly in 1933.

(*k*) Government of India Act, 1935, ss. 129 (broadcasting), 130—134 (water rights), Part VIII. (railways).

(*l*) *Ib.* Part III.

(*m*) *Ib.* ss. 55—58.

by the governor-general and the Secretary of State, and a proclamation requires the authority of the former. Bills of the legislature he may assent to, refuse assent to, or reserve for the governor-general, and the latter may assent, refuse assent, or reserve, and the King may withhold or give assent, and disallow any bill assented to by either. Provincial executive power must be used so as not to hamper federal power, and aid must be given to facilitate defence requirements. The federal legislature can impose obligations on the provincial governments, any extra cost to be borne by the federation. The governor-general may require the governors to act for him as to defence, ecclesiastical and external affairs and tribal areas.

**The Legislatures.**—In Madras, Bombay, Bengal, the United Provinces, Bihar and Assam the legislatures are bi-cameral, otherwise unicameral. The franchise is extended to cover in the whole of the country about 14 per cent. of the population, women being enfranchised in the proportion of one to seven; the electorate exceeds 35,000,000. Arrangements are made to secure fair representation, general with special reservations for depressed classes; Muhammadans (with a virtual majority in Bengal and Punjab, and an absolute majority in Sind and the North-West Frontier Province); Indian Christians; Anglo-Indians; Europeans; land owners; labour; universities; commerce and industry; mining and planting; and backward areas, with seats for women. The number of members range from 250 for Bengal, 228 United Provinces, 215 Madras, 175 Bombay and Punjab, 152 Bihar, 112 Central Provinces, 108 Assam, to sixty each for Orissa and Sind, and fifty for the North-West Frontier Province. The upper houses are elected usually by general constituencies, Muhammadan and European, but in Bengal and Bihar twenty-seven and twelve seats are filled by the legislatures; the numbers are as a maximum, sixty-five Bengal, fifty-six Madras, sixty United Provinces, thirty Bombay and Bihar, and twenty-two Assam. The governors have to fill not over ten seats in Madras, eight in Bengal and the United Provinces, and four in the others. Members are paid, and age twenty-five is insisted on in the Assemblies, as against thirty in the councils. Disagreements between the houses are settled by joint sittings; the lower houses have financial initiative and alone vote grants.

**The Division of Powers of the Legislatures.**—The powers of legislation are divided between the centre and the provinces, with, in several cases, concurrent powers, the centre having certain powers to secure uniformity. The lines of demarcation are on the basis of 1919; on matters not within federal authority, the federation may legislate to implement a treaty with prior assent of the governors of the provinces and rulers of the states, a most inconvenient and unwise process (n). In emergency of war or internal disorder the federation may, on a proclamation of emergency by the governor-general, invade the provincial sphere temporarily (o). Powers not assigned to either

(n) Government of India Act, 1935, s. 106 (1).

(o) *Ib.* s. 102.

in the long and detailed lists (*p*) can be given to either by the governor-general (*q*). In many cases legislation requires the previous sanction, in his discretion, of the governor-general or governor, but failure to give it does not invalidate the Act, if later assented to (*r*). In the concurrent sphere a provincial Act can alter a federal Act if reserved and assented to, and such an Act can only be altered by a federal Act if passed with previous sanction (*s*). Very elaborate provisions forbid discrimination of any kind on racial and other grounds (residence, language, religion, place of birth) between British subjects and companies domiciled or incorporated in the United Kingdom and those of Indian domicile, and secure fair treatment as regards the exercise of the medical and other professions (*t*). Excluded from legislative power in both cases are the Sovereign, the royal family, the dominion or suzerainty of the Crown in India, nationality, the Army, Air Force, and Naval Discipline Acts, the law of prize, the Constitution Act itself, and rules under it, and the right to grant special leave to appeal.

**The Allocation of Revenues.**—Import duties, railway and other federal receipts, coinage profits, and those of the Reserve Bank are exclusively federal. Export duties, salt duties, tobacco and other excises (save those on alcoholic liquors, drugs and narcotics), fall under federal control, but part or whole may be granted to the provinces or states; certain stamp duties, succession duties, taxes on fares and freight, and terminal taxes under federal legislation, will be given to the provinces with power to the federation to impose a surcharge. The provinces will control entirely land revenue, alcohol, drug and narcotic excises, certain stamps, forests and other commercial undertakings and miscellaneous sources of revenue. Income tax is federal for legislation, but up to 50 per cent. eventually, by stages in five years, will be granted to the provinces, the federation may impose surcharges, and in that case states must pay an equivalent sum. Corporation tax is federal, but is not to be levied for ten years on any state (*u*). Subventions are necessary for the North-West Frontier Province, Sind, Orissa, and Assam, and the United Provinces (*x*).

**The Chief Commissioners' Provinces.**—British Baluchistan, Delhi, Ajmer-Merwara, Coorg, the Andaman and Nicobar Islands, and Panth Piploda are administered through chief commissioners by the governor-general. British Baluchistan he administers at his discretion and applies if he desires federal Acts, and makes regulations; he also makes regulations for the Andaman and Nicobar Islands. Coorg retains its legislature. In all he approves changes of police rules, and has the same powers as a governor as regards dealing with crimes of violence and non-disclosure of information (*y*). Subject to these

(*p*) *Ib.* Sched. VII.

(*r*) *Ib.* ss. 108, 109.

(*s*) *Ib.* s. 107 (2); otherwise federal law prevails.

(*q*) *Ib.* s. 104.

(*t*) *Ib.* ss. 111—121.

(*u*) Government of India Act, 1935, Part VIII.; for distribution of revenues, see Order in Council, July 3, 1936, No. 676.

(*x*) *Ib.* s. 142; Order in Council, July 3, 1936, No. 676, s. 9.

(*y*) *Ib.* Part IV.

limitations, the federation has authority over the provinces which are units, and in regard to them its legislative power is complete (2).

**Territorial Limits of Legislation.**—The provinces can legislate for the provincial areas or parts thereof only. Federal legislation can apply to (1) British subjects and servants of the Crown in any part of India; (2) British subjects domiciled in any part of India wherever they may be; (3) to, or to persons on, ships or aircraft registered in British India or any Federated State wherever they may be; (4) in the case of a law with respect to a matter accepted as federal by a state in its instrument of accession, to that state and its subjects wherever they may be; and (5) to members of and persons attached to any naval, military or air force raised in British India (a). The federal legislature may also apply the Naval Discipline Act to Indian naval forces, with any adaptations, but if the naval forces or ships are placed at the disposal of the Admiralty the Act applies absolutely (b).

**The States.**—Each state will enter by a special instrument not necessarily on identical terms, but each must accept substantially the list of federal subjects, and undertake to secure due administration of its own subjects. It may secure the right to administer federal Acts, but subject to the governor-general's right of inspection and to obedience to any orders the latter may give. The ruler must also respect the executive authority of the federation; the Federal Court having authority to decide any issue (c). To secure adherence large concessions are offered to the states by way of remission of tributes of all kinds now payable, and even payments in respect of the value of lands formerly ceded in lieu of tributes, in respect of obligations of defence. But in such cases deductions are to be made in respect of any privileges inconsistent with federal equality, e.g., right to levy customs, produce or tax salt, free entry of goods, issue of currency notes, free carriage of mails (d).

**Federal Anomalies.**—The federation is thus anomalous. (1) It is a federation of unequal units; the provinces enter compulsorily, but are given a wider autonomy; the states are free and may enter each on different terms. (2) The provinces are democratically governed, the states autocratically, and there is no power to bridge the gulf, though Mr. Gandhi has had some success in securing promises of reform in the states. (3) The subjects dealt with in the states by the federation may vary substantially, and their administration may be federal or state. (4) There is a wide sphere of concurrent legislation for federation and provinces, subject to the discretionary action of the governor-general. (5) The states are over-represented in the council of state, having a third of the seats with a fourth of the population, and are treated differentially in finance. (6) The governors are largely under the governor-general's control. The state rulers are required to carry

(2) Government of India Act, 1935, Part IV. s. 100 (4).

(a) *Ib.* s. 99. For the necessary changes in the Army and Air Force Acts see Order in Council, 1937, No. 230, pp. 981 ff.

(b) Government of India Act, 1935, s. 105.

(c) *Ib.* Part VI. ss. 124—128.

(d) *Ib.* Part VIII. ss. 146—149.

out his directions, but to enforce them there is no other means than resort to his capacity as representative of the Crown in its relations with Indian states (e), who, as exercising paramount power, may coerce or even depose the ruler. (7) The states, even if federated, have a wide sphere unaffected by the federation in which they have no relations with the governor-general as such. But, naturally, in his action as representative of the Crown, the governor-general cannot but be affected by federal issues and so indirectly, even in regard to non-federated states, federal interests may prevail. (8) No power of amendment is given to Indian authorities, and, while secession is not contemplated, it is clear that no fundamental change towards full responsible government is possible without affecting the adherence of the states.

**The Secretary of State.**—The Secretary of State (f) ceases to hold Indian property, which is transferred to the Crown on behalf of the federal or provincial executive, with a saving of his liability to suit in respect of existing obligations. His council has been reduced on federation to advisers, who may be from three to six in number, who need only be consulted at his pleasure, save as regards rules regulating the public services or appeals from public servants. He ceases to occupy the position of controlling the whole government of India and tends to occupy a position like that of the Colonial Secretary. The executive authority in each province and the federation is formally vested in the King, acting through the governors or governor-general (g). Much of the business work of the India Office was transferred under the Act of 1919 to a High Commissioner, who continues to exercise his functions, but subject to the governor-general. The cost of the India Office now falls directly on the British Exchequer.

**The Judiciary.**—In Calcutta, Madras, Bombay, Allahabad, Lahore, Patna, and Nagpur, High Courts of justice, presided over by a chief justice and puisne judges, have been erected by Letters Patent under statutory authority (h); Assam falls under the Calcutta High Court; Oudh has its own Chief Court; Sind and the North-West Frontier Provinces have judicial commissioners. These rank as High Courts. In the other provinces the highest Court is that of the judicial commissioner, or, where no such person is appointed, of the chief commissioner.

Appeal in civil and criminal matters lies to these Courts from the district Courts, and the decision of the High Court is final in non-federal issues, except where appeal lies to the Judicial Committee of the Privy Council, the conditions of appeal being regulated by the charters or Letters Patent by which the Courts were erected (i). It

(e) *Ib.* s. 3 (2); cf. s. 285.

(f) *Ib.* Part XI. ss. 278—284.

(g) *Ib.* ss. 1, 7, 49.

(h) As to the constitution and jurisdiction of these Courts, see 5 & 6 Geo. V. c. 61, ss. 101—114; for Nagpur, S. R. & O., 1935, No. 1250, p. 717. The judgments of these and district Courts are on a basis of reciprocity recognised in England under 23 & 24 Geo. V. c. 13 (S. R. & O., 1938, No. 1363).

(i) And, as to civil cases, also by the code of civil procedure, ss. 109, 110; *Raghunath Prasad Singh v. Partabgarh (Deputy Commr.)* (1927), L. R. 54 Ind. App. 126; *Sardar Ali v. Dalimuddin* (1928), I. L. R. 56 Calc. 512.

may be noted that the wide power of control of inferior Courts exercised under the former regime under s. 107 of the Government of India Act, has disappeared under s. 224 (2) of the Act of 1935.

In every province there are also divisions with a sessions judge, and divisions are divided into districts with district and subordinate magistrates. These sessions judges (usually appointed from members of the Indian Civil Service) and the subordinate magistrates administer the criminal law, but sentences of death must be confirmed by the High Court (*k*). The civil inferior Courts are presided over by district judges (usually the same as the sessions judge), subordinate judges, and munsiffs.

**The Federal Court.**—The jurisdiction of the Court is original in all disputes between the federation or any unit (state or province), or any units *inter se*. But in the case of a state it applies only to (1) the interpretation of the Act, or Order in Council under it, or the extent of legislative or executive authority of the federation under the instrument of accession; (2) any agreement for the state execution of federal legislation (3) any agreement made after federation between the state and a federation or province which expressly provides for acceptance of jurisdiction. (*l*) Appeals lie from any High Court on its certificate, given on its own motion, that a substantial question of law affecting the interpretation of the Constitution is involved, and the appellant may also appeal on any ground in addition, either without leave if an appeal would otherwise lie to the King in Council, or with the leave of the federal Court. In such a case no appeal can be brought direct with or without leave to the King in Council (*m*). A general appeal in issues involving not under 15,000 rupees may be provided for by federal Act, and the appeal to the Privy Council may be cut off, but such an Act needs the previous sanction of the governor-general (*n*). Appeals by way of special cases stated either on its own initiative or by requirement of the federal Court lie from state High Courts in the cases above-mentioned (*o*). All Courts and authorities must give effect to the declarations of the federal Court as to the judgment to be entered (*p*). The governor-general may obtain advisory judgments (*q*).

Appeal to the Privy Council lies without leave from the original jurisdiction of the federal Court in constitutional issues, and by its leave or that of the Privy Council in all other cases (*r*).

Proceedings are to be in English, and majority judgments, with dissenting separate judgments, are provided for (*s*).

**Judicial Tenure.**—Judges up to six puisne judges and a chief justice are appointed by the King under the sign manual and retirement is compulsory at age sixty-five, but a judge may be removed under sign

(*k*) Pardon in such cases rests with the governor-general alone: Government of India Act, 1935, s. 295.

(*l*) Government of India Act, 1935, s. 204.

(*m*) *Ib.* s. 205.

(*o*) *Ib.* s. 207.

(*q*) *Ib.* s. 213.

(*s*) *Ib.* ss. 213 (2), 214 (2), (3).

(*n*) *Ib.* s. 206.

(*p*) *Ib.* ss. 209, 210.

(*r*) *Ib.* s. 208.

manual warrant on a report by the Judicial Committee on the ground of misbehaviour or of infirmity of mind or body (*t*). Like conditions, with age sixty for retirement, are now provided for judges of the High Courts (*u*). Moreover, a wide measure of protection against unfair treatment is given to inferior judges and magistrates (*x*). All these judges are secured against discussion in the legislatures, a strong step, but justifiable under Indian conditions.

**The Legal System.**—The law administered by these Courts consists of—

- (1) Imperial Acts extending to India (*y*), and rules and orders made thereunder.
- (2) Acts of the governor-general in council (*z*), of the Indian legislature since 1921, of the governor-general alone, and rules, regulations, and orders made thereunder; ordinances made by the governor-general (*a*), and regulations for special areas made by the governor-general in council (*b*).
- (3) Acts passed prior to April 1, 1937, by the local legislatures of the various presidencies, and provinces under lieutenant-governors (*c*) or governors, and rules and regulations made thereunder.
- (4) Certain regulations made by the governments of Bombay, Madras, and Bengal, before 1833 (*d*), and by the governor-general in executive council for the Punjab up to 1861 (*e*).
- (5) For Europeans and residents in the presidency areas English law is generally applicable, having been introduced in part by the charter of 1661, and more generally by the charters of 1726 and 1753. Statute law of general application was introduced by the charter of 1726. The law, of course, applies only as far as it can be made applicable in local circumstances (*f*).
- (6) The Hindu and Muhammadan law, and the customary law of particular castes or races, such as Jains or Sikhs, in causes between natives relating to family matters or inheritance, in so far as it has not been superseded by legislation (*g*), nor is contrary to justice, equity and good conscience.

(*t*) *Ib.* s. 202 (2). There are three judges appointed 1937.

(*u*) *Ib.* s. 220 (2).

(*x*) *Ib.* ss. 253—256.

(*y*) Either expressly or by necessary implication.

(*z*) Under 3 & 4 Will. IV. c. 85, and subsequent Acts.

(*a*) Under 24 & 25 Vict. c. 67, s. 23; 5 & 6 Geo. V. c. 61, s. 72.

(*b*) 5 & 6 Geo. V. c. 61, s. 71.

(*c*) Under the authority of the Indian Councils Act, 1861 (24 & 25 Vict. c. 67), and 9 & 10 Geo. V. c. 101, s. 10.

(*d*) See the Madras, Bombay, and Bengal codes respectively. The Bengal regulations were extended to Benares and the North-Western Provinces, hence called "regulation provinces." But they were not put in force in Assam, Arakan, and Tenasserim (1824) or Pegu (1852); hence called "non-regulation provinces."

(*e*) This assumed power for non-regulation provinces was validated as regards its prior exercise in 1861.

(*f*) *Lyons Corp'n. v. East India Co.* (1836), 1 Moo. P. C. 175; *Advocate-General of Bengal v. Surnomoye Dossee (Ranee)* (1863), 2 Moo. P. C. (N. S.) 22; *Freeman v. Fairlie* (1828), 1 Moo. Ind. App. 305.

(*g*) Indian criminal law has been entirely superseded by legislative enactments.

- (7) Acts passed by the central legislature since April 1, 1937, and the provincial legislatures since that date, under the Government of India Act, 1935; by the governor-general and governors thereunder, and when federation takes place by the federal legislature, and rules and regulations made thereunder.

It has been necessary, of course, largely to adopt existing legislation to the new position. This has been effected by the Adaptation of Acts of Parliament Order, March 18, 1937, and the Adaptation of Indian Laws Order, March 18, 1937, both later supplemented.

**The Indian Civil Service.**—The civil administration of India, so far as the higher control and direction are concerned, is carried on for the most part by members of the Indian Civil Service. This service was thrown open to competition amongst natural-born British subjects in 1853, subjects of Indian rulers were made eligible in 1916, and certain offices are reserved for its members or persons domiciled in India (*h*). Under various Acts provision has been made for appointment to the service of Indians without examination (*i*). Indianisation of the service was demanded by Indian opinion and conceded in principle in 1917. Examinations were accordingly appointed to be held in India as well as in London, and under the recommendation of the Lee Commission of 1924 it was arranged that 20 per cent. of the superior posts should be filled by the promotion of provincial service officers to certain classes of appointment, and direct recruitment should be of Europeans and Indians in equal numbers, thus giving equality, it was anticipated, by 1939, in a total of 1,350 members. Examinees must spend a period of one or two years in the United Kingdom on probation; on final examination, if approved, the Secretary of State formally appoints. The power to appoint is retained under the new constitution, and full authority to determine numbers and conditions of service rests with him. To keep up the number of Europeans it has been necessary to limit competition by Indians in the examinations held in England, and to appoint a number of candidates without examination. These measures are eloquent of the decline in the attractions of the service. Elaborate provision exists to safeguard their rights of employment and security of tenure or compensation for unfair treatment, control of finance in these matters being removed from the legislatures, while decisions affecting officers require the personal sanction of the representative of the Crown (*k*).

**Political Service.**—The political service, *i.e.*, those mainly engaged in connection with relations with the states, recruited in part from the Indian Civil Service and in part from military officers and others, remains entirely under the control of the Secretary of State and the representative of the Crown, who deals with it in a political department, not considered part of the Government of India. Foreign questions

(*h*) 5 & 6 Geo. V. c. 61, s. 98; 6 & 7 Geo. V. c. 37, s. 3; 9 & 10 Geo. V. c. 101, s. 37.

(*i*) 5 & 6 Geo. V. c. 61, s. 99.

(*k*) Government of India Act, 1935, ss. 244, 246—249. Pensions for wives and children are also safeguarded.

proper—relations of India with other states—are dealt with by the governor-general in the external affairs department of that government, external affairs being a matter reserved to the governor-general (*l*).

**Other Services.**—The Indian police, similarly European in composition before the reforms, was under the commission's recommendation to be constituted on a basis of equality between Europeans and Indians by 1949, 20 per cent. being promoted from the provincial services, and five Europeans to three Indians by the Secretary of State. Control over it rests, as in the case of the Indian Civil Service, with the Secretary of State, who also controls the Indian Medical Service (civil) (*m*). The other services (*n*) maintained under the Secretary of State's control since the reforms of 1919, were the Irrigation Branch of the Indian Service of Engineers and the Forest Service in those provinces in which it remained a reserved subject. The other services in general were left to the provinces, and are being Indianised. Under the Act of 1935 all were handed over, except that the Secretary of State has a discretionary right to appoint officers to any post connected with irrigation (*o*). The federal and provincial governments have thus distinct services under executive and legislative control, all officers holding at pleasure in law (*p*).

Very elaborate provisions are laid down ensuring full protection of officers, especially those recruited in the past by the Secretary of State, special responsibilities being laid on the governor-general and governors. Further, for recruitment and control, a Public Service Commission was set up in 1926 for India, and in 1929 one for Madras; there is also one for Bengal. These bodies are maintained and reinforced under the Act of 1935 (*q*). Railway servants fall under the federal railway authority (*r*).

**Legal Liability.**—Claims against the government in India were possible under the company's regime, and in 1858 they were still valid against the Secretary of State in Council, lying in all matters not definitely political in character, such as acts of state. This system ceases, in general, in that form, but claims lie against the federation and the provinces and against the Secretary of State for contracts made in England, but all costs fall on local funds (*s*). Individual liability of officials is limited by restrictions on prosecutions under s. 197 of the Code of Criminal Procedure, and on suit by ss. 80—82 of the Code of Civil Procedure, and these can only be affected with the previous sanction of the head of the government; a wide indemnity for acts done before April 1, 1937, is accorded, and damages and costs awarded in civil suits may be paid by government (*t*).

(*l*) *Ib.* s. 257. For aid at his discretion by governors and officers, see s. 287.

(*m*) *Ib.* s. 244.

(*n*) The Secretary of State controls high judicial appointments and those of chaplains, as part of ecclesiastical affairs: *ib.* s. 269.

(*o*) *Ib.* s. 245.

(*q*) *Ib.* ss. 264—268.

(*r*) *Ib.* ss. 177—180.

(*s*) *Ib.* ss. 270—271. As noted above, the heads of the governments are immune from all legal proceedings in India while in office (s. 306), even as regards private debts and crimes. Governors in the Dominions are not thus exempt.

(*p*) *Ib.* ss. 240, 241.

(*r*) *Ib.* s. 242 (1).

**Defence.**—Indian defence is essentially dependent on the British navy, to which a small contribution was formerly made, but provision was made for a navy locally by the Government of India (Indian Navy) Act, 1927, and a small force is maintained, including five escort vessels. Authority to legislate for it is central (*u*); the flag officer commanding is appointed by the Crown. It is governed by the Indian Navy (Discipline) Act, 1934 (No. XXXIV.). All defence matters fall under the discretion of the governor-general, whose instructions, however, will contemplate his endeavouring to secure ministerial co-operation and sympathy, especially in finance issues (*x*). All defence appointments are controlled by him, save those specially reserved for the Crown (*y*). The commander-in-chief is appointed direct by the Crown (*z*), and his views necessarily weigh heavily with the British government (*a*). Military and air defence are controlled by the commander-in-chief under the governor-general. The European army is provided from the United Kingdom; the Indian army is still mainly under European officers, who are recruited by examination and trained at Sandhurst, but gradual Indianisation is provided for by arranging for the officering of a complete division, a cavalry brigade and artillery (field and horse), and by the creation of a military college. The British Government since 1933 contributes £1,500,000 towards the cost of Indian defence, and affords assistance by providing facilities for higher training of officers in England. Further concessions are promised, in view of the extra cost of the army due to large concessions to men and officers as regards pay, &c. The British troops number about 56,000; the Indian army, 157,000; the army reserve 35,400. There is also a territorial force, 19,000 strong; an auxiliary force on a voluntary basis, 24,000, and the Indian states forces, if placed at the disposal of the government, would give some 40,000. The British forces serve under the Army and Air Force Acts, the rest under central (*b*) or state authority. Commissions are granted in the name of the Crown. In the important duties of increasing the number of Indian officers, and of deciding whether Indian troops should be employed on service outside India, the governor-general will be instructed to consult ministers, as well as the Finance Minister in matters of defence. No money may be paid from Indian funds save for Indian purposes, so that use of Indian forces outside India must normally be at British cost.

**The Indian States.**—In addition to British India proper, there are some 562 dependent native states (*c*) under the suzerainty of the

(*u*) Government of India Act, 1935, s. 99 (2) (e).

(*x*) See Draft Instructions, xvii and xix (Cmd. 4805, p. 6).

(*y*) Government of India Act, 1935, s. 233; Order in Council, December 18, 1936.

(*z*) Government of India Act, 1935, s. 4.

(*a*) Lord Curzon's resignation was due to his being overruled in favour of Lord Kitchener: Keith, *Const. Hist of India, 1600—1935*, p. 190.

(*b*) Government of India Act, 1935, s. 99 (2) (e); Indian Army Acts, 1911, 1934 1937.

(*c*) These vary greatly in size, only some 200 being of any great importance. The Nizam of Hyderabad (the premier state in India) rules over a territory comprising some 82,700 square miles. The territories of some of the smaller chiefs comprise only a few acres.

Crown, and these occupy a somewhat anomalous position (*d*). The jurisdiction exercised by the Crown is somewhat peculiar in character. It was definitely laid down in the *Manipur Case* in 1891 that the relations of the states with the Crown were not governed by international law, and that resistance to the British authorities could be treated as treason, and the slaughter of British officers be punished as murder. The fact is that originally the East India Company treated the states as equals; then it placed them in the position of subordinate allies, over which it claimed paramount powers. This attitude was reinforced by the extinction, after the mutiny, of the office of the Mogul Emperor or King of Delhi, who never admitted his subordination, and by the assumption by the Crown of the direct government of India. Moreover, some states owe their existence to the action of the company or the Crown and are pure vassal states, while in other cases states are now in a feudatory relation to the Crown, as formerly to the Marathas. The original treaties with the older states have been essentially modified by practice, and arguments based on them (*e*) are of minimal value. The territory of these native states is not British territory, and they may best be regarded as rather anomalous British protected states, as they have been treated in legislation (*f*). The extent of control exercised by the Crown varies in different states. In all cases, however, Great Britain controls the foreign relations of the native state, assumes responsibility for its internal peace and the welfare of British and foreign subjects within its borders, and requires its co-operation in repelling foreign aggression. In no case can the native state declare peace or war, or maintain diplomatic relations with other states or foreign countries.

All matters of salutes, precedence, grants of titles (*e.g.*, His Exalted Highness to the Nizam) are decided by the Crown. Prior to the reforms of 1919 many states were in direct relations with local governments, but that has since been altered, and the states are in relations with the governor-general, who is in charge of the Political Department, and acts through residents or agents.

The defects of state rule are those of autocracy; there is (1) no settled constitution; legislatures are advisory only, even in Travancore and Mysore, well-managed states, though reforms are being extended in both, and in Cochin a measure of dyarchy has been introduced under a new constitution of 1938. It has been quite incorrectly claimed that responsible government is incompatible with the rights of the paramount power: All in fact that is requisite is to include in the constitution the rule of obedience to paramount requirements and, as intervention is normally due to misgovernment, necessity for it would be lessened under responsible government. (2) The rule of

(*d*) See Keith, *Const. Hist. of India, 1600—1935*, pp. 212 ff., 441 ff.

(*e*) *Parl. Paper, Cmd. 3302 (1929)*. For incorrect views, see *ib.* pp. 59—73.

(*f*) By the Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), s. 15, where in future an Order in Council is made extending to persons enjoying His Majesty's protection, all subjects of the several princes and states in India are to be included in that expression. The Fugitive Offenders (Protected States) Act, 1915 (5 & 6 Geo. V. c. 39), is applicable to the states; *e.g.*, the Pudukkotal State (Fugitive Offenders) Order in Council, 1937 (No. 761, p. 830).

law is unknown; judges in many states are under executive control; justice may be arbitrary. (3) Redress against acts of state officials cannot be obtained save by favour. (4) There is no binding distinction between private and public funds, and there is much waste and speculation. (5) Only in a few states is the civil service organised effectively. (6) The rights of the subject are dependent on the ruler's whim. (7) No opportunity is given for democratic progress.

**Jurisdiction.**—Though primarily the jurisdiction of the Crown over the feudatory native states depends upon treaty or agreement, in practice the Crown claims and exercises a much larger measure of control where the interests of the Empire or of the subjects of the native princes are concerned (*g*). The Crown claims the right to construct railway or telegraph lines through Indian States in the interests of defence; to decide any disputed succession; and to supervise administration of a state during a minority. In many cases it has secured the suppression of state mints and of local posts, but the states can usually impose local customs; in a few cases they can levy sea customs. In cases of flagrant misgovernment or absenteeism the Crown even goes so far as to suspend temporarily, or actually to depose, as in the case of the Gaekwar of Baroda in 1875, the native rulers. But since 1920 a Commission of Enquiry, as recommended by Queen Victoria, may be appointed to advise the Government of India before action is taken (*h*). It was, however, not asked for by the ruler of Indore (1926), nor apparently in any other recent case (Nabha in 1928; Dewas (Junior Branch) in 1934). The final decision as to any disputed issue rests with the British Government as explained in 1926 by Lord Reading in the dispute over Berar, when the Nizam of Hyderabad asserted that the Crown was not entitled to insist on its own interpretation of the treaty assigning control of the administration of the territory (*i*). In most native states, however, the management of internal affairs, including legislation, defence, taxation and the administration of justice, is left in the hands of the native government with the help and advice of a British political resident agent. But the states do not exercise jurisdiction over British or foreign Europeans, except by delegation from the Governor-General in Council, or over offences by officers and soldiers of the Indian Army, not on leave, and the Crown exercises jurisdiction over cantonments and residencies in the State, and over railway areas (*k*). In order to secure acceptance

(*g*) See Hall, *Foreign Jurisdiction*, p. 206, n.; M. Ramaswamy, *Law of the Indian Constitution*, ch. iii.

(*h*) No appeal lies to the Privy Council in such cases: *Madhava Singh v. Secretary of State* (1904), L. R. 31 Ind. App. 239.

(*i*) See Parl. Pap., Cmd. 2429, 2631 (1926).

(*k*) See *Muhammad Yusuf-ud-din v. Queen Empress* (1897), L. R. 23 Ind. App. 137; *Hemchand Devchand v. Azam Sakarlal Chhotamlat*, [1906] A. C. 212. The exercise of jurisdiction is now regulated by the Indian (Foreign Jurisdiction) Order in Council, 1902, validated by 6 & 7 Geo. V. c. 37, s. 5. See Government of India Act, 1935, s. 294; Indian (Foreign Jurisdiction) Order in Council, March 18, 1937 (S. R. & O., No. 251, p. 805). The powers under the Order of 1902 still rest with the governor-general in council, to pass on federation to the former alone, save in so far as they are connected with the Crown's relations to the states when they fall to the representative of the Crown. This is far from clear.

of federation considerable concessions in these matters have been recently made. The legislatures of British India have no direct legislative power over the states or state subjects, nor do the states fall under the jurisdiction of British Indian Courts, though the legislature of the centre and the Courts have, as mentioned above, certain authority as to British subjects or servants of the Crown while in the states. Parliament, of course, does not normally legislate for the states, save in the Government of India Act, 1935, for federated states, but it has the power to do so, and has done so, for state subjects outside the states in the Foreign Jurisdiction Act, 1890 (s. 15), and in the Slave Trade (India) Order in Council, 1913 (under 39 & 40 Vict. c. 46).

The states are strictly limited as to the number of troops they are allowed to maintain, and no European is allowed to reside at their Courts without a special permit from the British Government. A number of states now maintain under their own control, unless transferred to the charge of the commander-in-chief, state forces, which are under state officers, but are trained on British lines with aid of British officers. To do so requires special permission. If British forces are needed to aid the states, the governor-general can supply, but federal funds must be reimbursed under sect. 286 of the new Constitution.

The changes which will apply to the states which enter federation are referred to above. Full responsible government cannot be conceded to the federal executive without affecting the accession of the states, whose consent would be necessary to make it permissible (1).

**The Chamber of Princes.**—As the result of the reform scheme of 1919 there was instituted a Chamber of Princes for the purpose of focussing the views of the Princes on all issues affecting the states in their relations with British India and the Crown. It consists of 109 states represented by their rulers, and of twelve representatives elected by the rulers of 127 states. The Chamber has no executive and legislative powers, and has not attracted the approval of the greater states. But it has focussed opinion on the issue of accession and discussed repeatedly the terms to be demanded in the interests of autocracy. It has also secured various concessions, including the rule that normal successions to the thrones of the states under the principles laid down by Lord Canning after the mutiny are valid without confirmation by the paramount power. Apart from the Chamber it still is the rule that any inter-state relations, other than purely formal, require the assent of the Indian Government.

**Outlying States.**—Three outlying states come within the sphere of British influence, but cannot be said to be dependent states. These are—Nepal, Bhutan, and Afghanistan. They enjoy complete internal independence, but Bhutan, a state of 18,000 square miles, south-east of the Himalayas, by treaty of 1910, under which it receives a subvention then fixed as a lakh of rupees, agrees to be guided in external affairs by British advice. No resident is there maintained. Nepal

(1) This follows from Government of India Act, 1935, s. 6, and Sched. 2.

under the treaty of 1923 is, since 1934, represented by an envoy extraordinary and minister plenipotentiary at London, and receives such an envoy on a footing of sovereign international independence. It is freed from any restriction as to the residence therein of Europeans or Americans, and can freely import arms (*m*). From it are derived the invaluable Gurkhas of the Indian army, but the country maintains a rigid isolation and exclusion of foreigners.

The titular sovereign rules through a hereditary Prime Minister; the voluntary abolition of slavery in Nepal has added to the credit of this office. The Amir of Afghanistan was formerly bound by agreement not to maintain foreign relations with any Power except India, but after the war of 1919 he was recognised as completely independent (*n*), though the British Government, which maintains a Minister in Afghanistan, and receives one in London, also exchanging consuls, has shown much consideration for the interests of the Kings, without interfering in any way with the local revolutions. A constitution was granted by King Nadir Shah on October 31, 1931, with a nominee Senate of forty-three members and a National Assembly of 110 elected members, but the council of ministers is responsible to the King only.

**Fundamental Rights.**—It was found impossible to include in the constitution any declaration of fundamental rights, because the states could not agree to admitting them for their subjects. But certain principles were already operative in British India, and these were recognised. No British subject domiciled in India shall, on grounds only of religion, place of birth, descent, colour or any of them, be ineligible for office under the Crown in India, or be prohibited on any such grounds from acquiring, holding, or disposing of property or carrying on any occupation, trade, business or profession in British India (*o*). This rule, of course, does not forbid the restriction to members of agricultural communities of the right to acquire agricultural land, or deny rights of members of a community under personal law or custom. Property cannot be taken from any person in British India save under law, which must provide compensation for land taken for public purposes, and bills to take land require previous sanction by the governor-general or governor, as the case may be (*p*). Existing land rights and pensions can be taken away by executive action only with the authority of the head of the government (*q*).

**Constitutional Change.**—Practically no important power of constitutional change is accorded. After ten years the legislatures may ask for certain small changes; thus the federal legislature may propose the variation of the size or composition of the chambers, or method of choosing or qualifications of members, but there may be no variation in the proportionate strength of the houses or of the proportionate strength of state representation. There may also be

(*m*) Treaty, December 21, 1923; Cmd. 2453 (1925).

(*n*) Wheaton, *International Law* (ed. Keith), i, 32, 330; treaty, November 22, 1921, Cmd. 1786.

(*o*) Government of India Act, 1935, s. 298.

(*q*) *Ib.* s. 300.

(*p*) *Ib.* s. 299.

suggested the change of the franchise. A provincial legislature may seek to vary the composition of the legislature, the method of choosing and qualifications of members, and the franchise. It may also at any time ask for the reduction to literacy merely of any higher educational qualification for women and for dispensing with application to be registered in their case. But a report must be made of the view of the head of the government, who must state whether any minority will be effected and give the views of the minority's representatives in the legislature. Similar alterations may be made by the Crown in council at any time after receiving the views of the government and legislature (g). Orders in Council under the Act have to be approved by both houses specifically, both under these provisions and under the other authorities in the Act, including that of altering the Act to remove emergent difficulties of detail (r).

**India and the League of Nations.**—India as a whole was made a member of the League by the covenant, but actual control of policy in League matters of a political kind necessarily rests with the British government. On the other hand, Indian opinion has been considered in selecting the delegates who represent India at the League Assembly, and a leading prince has normally been associated with two representatives of British India. In the labour organisation India has a permanent place as a country of chief industrial importance, and policy is determined by strict regard to Indian needs. But the ratification of the conventions arrived at under League auspices is seldom possible, except when very large concessions have been made to meet Indian conditions. In any case, it has only been possible to ratify conventions for British India. To include all the states would be very difficult, and this position has been acquiesced in by the labour organisation. In the federation there will be a greater possibility of effective action binding the federated states. India has just grounds for dissatisfaction with the cost of her membership in the League in view of the few posts under it conferred on Indians, and on February 10, 1939, by fifty-five votes to forty-five, the Assembly pressed for withdrawal on the grounds (1) of the failure of the League to give effect to Art. 16 regarding sanctions, and (2) the disregard by Britain of its obligations under Art. 22 as to mandates.

**Foreign Relations.**—The governor-general will still maintain full authority under federation in all matters of this kind as opposed to inter-imperial relations, which are left to the action of ministers. This position is necessitated by the clear right of India to decide on the terms on which she will live with the Dominions. Her power of retaliation has enabled her to negotiate independently and to secure certain concessions for Indians in the Union of South Africa, where she maintains since 1927 an agent (s). Treaties proper are now sometimes negotiated in India, as the arrangements with Japan as to

(g) Government of India Act, 1935, s. 308.

(r) *Ib.* ss. 309, 310. Power to create new provinces and alter boundaries is given by s. 290.

(s) See Keith, *The Governments of the British Empire*, pp. 195 ff.

trade, but they are normally signed in London. It was, however, arranged when the Ottawa Conference, 1932, was held that the High Commissioner's Office, not the India Office, should be freely used as a channel of communication by the Indian delegation, but that was due to the inter-imperial character of the negotiations. The treaty then arrived at was denounced in 1938, and another was negotiated, in which the Indian government acted entirely in Indian interests, but it had to be carried over the head of the Assembly.

India no longer is in such close relations as before with Nepal and Afghanistan, as these powers send ministers to London, but naturally her political officers have strong claims to be selected for employment in all foreign countries in the vicinity of India, as in fact is the case.

**India and the Empire.**—The future of India remains uncertain. The attainment of Dominion status is no longer regarded as acceptable by the Congress party, whose ideal is complete independence. Successful in the provinces of Madras, Bombay, the United Provinces, the Central Provinces, Orissa and Bihar at the elections of 1937, its members refused to form ministries, except on assurances that the governors would not use their special powers to interfere with them in their constitutional activities. The request was ambiguous, but clearly (1) the governors could not promise never to use their special powers, and (2) they could have promised to use them only in case of real need, such as encroachment on minority or state rights or menace to peace and tranquillity. In fact they merely insisted on their legal inability to promise never to use their powers, with the result that ministries from the minority had to be formed, while in the other provinces coalition governments were secured. Later, the governors were authorised to give reasonable assurances, and Congress ministries took office, partly in order to be in a position to fight against the scheme of federation to which Congress remains absolutely hostile. Without ready co-operation on both sides the constitution cannot be worked in the sense of democracy. But, since the Congress ministries took office, later obtaining control in the North-West Frontier province also, their administration has been markedly successful, and the imprisoned revolutionaries have been released without so far serious damage to public order.

A serious danger presents itself in the extremist attitude of Mr. Subhas Chandra Bose, who was re-elected President of the Congress party in January, 1939, despite opposition by Mr. Gandhi. On the other hand, in February, 1939, the Viceroy forwarded to the states the drafts of instruments of accession in the hope that they would rally to federation in sufficient strength to secure its operation by 1941. In May, Mr. Gandhi had regained control of Congress, and Mr. Bose had resigned.

## CHAPTER VII.

## BRITISH BURMA.

**The Status of Burma.**—Burma now enjoys an unique position in the Empire, for it is not a colony (*a*), nor is it any longer in integral union with India. Burma includes all territories which, before April 1, 1937, when the Government of Burma Act, 1935, became operative, were comprised in India, being territories lying to the east of Bengal, the State of Manipur, Assam, and any tribal areas connected with Assam. British Burma means so much of Burma as belongs to His Majesty (*b*), who can decide the boundaries.

**The History of Burma.**—Burma in its present area results from the acquisition by cession of Tenasserim and Arakan in 1826, of Pegu in 1852 by conquest, and of Upper Burma and the Shan States by annexation after war in 1885. It had attained, after considerable delay, full provincial status when the reform scheme of Mr. Montagu and Lord Chelmsford was introduced, but owing to its supposed backward political condition there was some delay in applying to it the system of dyarchy (1923). The Simon Commission recommended separation from India, and the issue was discussed by a Round Table Conference in 1931—32, but without full agreement (*c*). An election to the legislature, held in order to secure a decisive result, failed to return a clear verdict, and Burmese delegates were invited to discuss issues with the Joint Committee on the governmental proposals for Indian reforms. Eventually the decision was adopted by the government to separate Burma, and this was effected by the Act of 1935 (*d*).

**The Powers of the Governor.**—The governor, who in recognition of the new status, but with dubious wisdom, was appointed from British political life, has to exercise the authority which in India is shared between the governor-general and the governors. Normally he acts with a ministry not exceeding ten members, but the following matters lie in his discretion (*e*): defence; ecclesiastical affairs; the affairs of a number of areas, including the Federated and other Shan States; the control of monetary policy, currency, coinage; external affairs, except the relations between Burma and other parts of the British Dominions; and the control of non-British areas in Burma.

(*a*) Government of India Act, 1935, s. 311 (4).

(*b*) Government of Burma Act, 1935 (26 Geo. V. & 1 Edw. VIII. c. 3), s. 158 (1).

(*c*) Parl. Pap., Cmd. 4004.

(*d*) 25 & 26 Geo. V. c. 42; reprinted separately, as 26 Geo. V. & 1 Edw. VIII. c. 3.

(*e*) Government of Burma Act, 1935, s. 7.

To aid him in these duties he may have three counsellors—at present one only—as well as a financial adviser, while he appoints and assigns functions to the advocate-general. His special responsibilities (*f*) in addition, are the prevention of grave menace to peace or tranquillity; the safeguarding of financial stability; of the legitimate interests of minorities; and of the public services; the securing in the sphere of executive action protection for British interests in Burma in the matters in respect of which legislative protection is given; the prevention of discrimination against British or Indian goods; the securing of the peace and good government of such backward areas as do not fall under his full control; and the prevention of interference with his full exercise of his special powers. He has to approve all police rules, he may take special powers to counter crimes of violence intended to overthrow the government, and may forbid disclosure of sources of police information. In all he does, otherwise than on ministerial authority, he is subject to the control of the Secretary of State (*g*). Like an Indian governor he receives an Instrument of Instructions, which must be approved by Parliament (*h*).

**The Legislature.**—The legislature consist of two houses (*i*). The House of Representatives consist of 132 members, ninety-one general seats, twelve Karens, eight Indians, two Anglo-Burmans, three Europeans, eleven representatives of commerce and industry, one representative of Rangoon University, two Indian labour and two non-Indian labour. The franchise is given to males or females, at age eighteen as against twenty-one in India, and the property qualifications are not very high. Members must be age twenty-five and of British descent, though subjects of Indian states may vote. The Senate consist of thirty-six members, half chosen by the governor, half by the lower house on the system of proportional representation. The Senate lasts for seven, the lower house for five years, unless earlier dissolved. Differences of opinion may be solved by joint sittings, which can be called in the same session if the issue is financial or affects the governor's special authorities. Bills may be assented to, refused assent, or reserved by the governor, and the Crown may disallow any Act. Legislative power is given to the governor in respect of his special charges, either by Ordinance or permanent Act, as was found necessary in 1938 to counter unrest, and he may issue Ordinances at the request of ministers when the legislature is not sitting (*k*). The special areas he can regulate by applying Acts or by regulations (*l*).

**Restriction on Legislation.**—As in India, the legislature may not deal with the Crown, the royal family, the sovereignty or suzerainty of the Crown in Burma, nationality, the Army, Naval Discipline and Air Force Acts or the law of prize, nor may it alter the Constitution Act or rules under it (*m*). There are also like provisions, as in India, against discrimination against persons of United Kingdom or Indian

(*f*) Government of Burma Act, 1935, s. 8.

(*h*) *Ib.* s. 9.

(*k*) *Ib.* ss. 41—43.

(*l*) *Ib.* s. 40.

(*g*) *Ib.* s. 10.

(*i*) *Ib.* Part III.

(*m*) *Ib.* s. 34.

domicile, companies formed therein, and ships and aircraft registered therein; provisions are made for recognition of British medical qualifications (*n*). In certain cases prior sanction is needed before any Bill can be introduced, including proposals to amend any Act of Parliament, or Governor's Act or Ordinance, or to affect any matter in his discretion, to deal with the police force or with criminal proceedings against European British subjects, or with immigration (*o*). Lack of such sanction does not invalidate if assent is given. The governor may also stop discussion of any measure if inimical to peace and tranquillity, nor may he be interrogated without his assent regarding his relations with any foreign state nor the administration of non-British areas or excluded areas (*p*).

**Territorial Extent of Legislation.**—The legislature may legislate for the territories vested in the King or any part thereof. This excludes the non-British areas, but it is significant that the power of Parliament expressly extends to Burma as a whole, as exemplified in the Act itself. The legislature may also apply its Acts to (1) British subjects and servants of the Crown in any part of Burma; (2) British subjects domiciled in Burma, wherever they may be; (3) to, or to persons on, ships or aircraft registered in Burma, wherever they may be; (4) to members and followers of defence forces raised in Burma (*q*). The Army and Air Force Acts have been duly amended accordingly.

**Procedure.**—The language of the legislature is English as in India, and only persons insufficiently acquainted with English may use another language. This rule has already been objected to and the demand made for authority to use Burmese at will. Ministers may speak in either house, but not vote (*r*).

**Finance.**—The budget must be submitted each year to the House of Representatives, but charges for debt, certain official salaries and pensions, sums for matters reserved to the governor and to meet decrees of Court, are not voted. The house may refuse any demand for grants made with the governor's authority, but he may restore it if necessary for any special responsibility (*s*). Financial bills must originate in the House of Representatives (*t*). The auditor-general is appointed by the Crown with judicial tenure, and his functions are regulated by Order in Council, which can be varied only by Act passed with previous sanction. The auditor of Indian home accounts may act for home expenditure of Burma. Burmese loans are given the status of trustee stocks (*u*), and the governor is obliged to secure the provision of all requisite funds to meet claims, including pensions, in the United Kingdom (*x*). The Federated Shan States remain under their existing constitution, and the federal fund remains in the control of the governor in his discretion, payments being made for general

(*n*) *Ib.* ss. 44—54.

(*p*) *Ib.* s. 29 (1).

(*q*) *Ib.* s. 33. See S. R. & O., 1937 (No. 230), pp. 978, 981 f.

(*r*) *Ib.* ss. 20, 30.

(*s*) *Ib.* s. 61.

(*u*) *Ib.* s. 65.

(*o*) *Ib.* s. 36.

(*t*) *Ib.* s. 63.

(*x*) *Ib.* s. 58.

Burmese services from it and to it from Burmese revenues for receipts fairly due. A Railway Board controls the railways on business lines (*y*).

**The Judiciary.**—The High Court at Rangoon is retained in operation with the same rules as to judicial tenure as in Indian provinces retirement at age sixty or by certificate of the Judicial Committee earlier on the score of misbehaviour or infirmity of mind or body (*z*). An additional appeal is provided for on constitutional issues involving the interpretation of the Act (*a*). Judges are secured salaries and pensions without legislative vote and their conduct may not be discussed in the legislature (*b*). The judgments of the High Court and of the district Courts are recognised in England under the Reciprocal Enforcement of Judgments (British India and British Burma) Order, 1938.

**The Services of the Crown.**—The same principles are laid down as for India. Servants hold at pleasure under the local government, but the Secretary of State controls appointments to the Burma Civil Service (Class 1), and to the Burma Police (Class 1), and may appoint civil medical officers, and, if necessary, irrigation officers (*c*). There are elaborate provisions for the protection of all classes of officers, and special rules as to judicial officers. The Burma Frontier Service, which is a counterpart of the Indian Political Service, falls entirely under the governor (*d*). He may also appoint chaplains. A Public Service Commission with considerable powers is provided for (*e*).

**Property and Legal Liability** (*f*).—Burma receives control of all property held in its interest by the Crown. The Government of Burma is liable to suit in place of the Secretary of State in Council in Burma, and the Secretary of State may be sued in contract in England. But all liability falls on Burmese funds. The governor is absolutely immune, both officially and personally, from legal process in Burma.

**Relations with India.**—To prevent difficulties due to the separation, the Crown by Order in Council may regulate relations regarding finance (*g*), may provide for immigration (*h*), currency and monetary questions (*i*), and customs duties (*k*). The plan adopted stereotypes the *status quo* as to customs and immigration for three years. Defence questions are reserved, and the defence service remains outside the control of the legislature, but the governor under his Instructions (Art. 16), naturally must aim at securing co-operation and assistance in developing Burmese military and air forces. In the meantime British and Indian forces will no doubt be used as heretofore, but at Burmese cost.

(*y*) Government of Burma Act, 1935, Part VII.

(*z*) *Ib.* s. 81; S. R. & O., 1937 (No. 256), p. 367.

(*a*) *Ib.* s. 87.

(*b*) *Ib.* s. 31 (1).

(*c*) *Ib.* ss. 101—103.

(*d*) *Ib.* s. 113.

(*e*) *Ib.* ss. 119—121.

(*f*) *Ib.* Part X.

(*g*) Parl. Pap., Cmd. 4902; S. R. & O., 1937, Nos. 252 and 266, pp. 1266 and 1262; 1938, No. 237; 1939, No. 367.

(*h*) Immigration Order, 1937 (S. R. & O., No. 254, p. 391).

(*i*) Cmd. 4901; S. R. & O., 1937, No. 267, p. 1268.

(*k*) Trade Regulation Order, 1937 (S. R. & O., No. 268, p. 1295).

**Constitutional Deadlocks.**—In the event of the constitution proving unworkable, the governor may by proclamation declare that any of his functions are to be operated at his discretion, and assume any powers other than those of the High Court. Such a proclamation must be laid before Parliament, and falls unless approved within six months; but the maximum duration of government under proclamation is three years (*l*).

**Constitutional Change.**—No power is given to the legislature to this end, but after ten years requests may be made to the Crown for change in respect of the constitution of the legislature, the method of choosing or the qualifications of members, or the franchise, and change may be made by Order in Council, or such change made before that date by the King in Council, but in either case there must be a report on the views of any minority likely to be affected (*m*).

**The Secretary of State.**—This office is established as a distinct office, but held by the Secretary of State for India for reasons of the common interests of the two countries, the Parliamentary Under-Secretary and the Permanent Under-Secretary act for both. A body of up to three advisers—at present two—may assist him at his discretion, but only in matters affecting the public services need he take their advice (*n*). A High Commissioner for Burma may be but has not been created (*o*).

**Fundamental Rights.**—From Indian precedent come the rules that no British subject domiciled in Burma shall be ineligible for office or be prohibited by law from acquiring, holding or disposing of property or carrying on any occupation, trade, business or profession on grounds only of religion, place of birth, descent, colour or any of them (*p*). Deprivation of property, save by authority of law, is forbidden; property can only be taken on payment of compensation duly assessed; bills to take property require previous sanction from the governor, nor may the executive authority of the government be used without the authority of the governor to cancel any grant of land or pension given for political services or on compassionate grounds (*q*).

**Non-British Areas.**—The position of Burma differs essentially from that of India, because there is little territory that is not British. The Shan States, mainly federated, are in many ways very similar in position and treatment to the Indian states, but they are in law parts of British Burma. Their chiefs govern them under the advice of the Commissioner, Shan Federated States. There are, however, on the eastern frontier the Karenni States, some 4,280 square miles in area, which are not annexed, and are managed by their own chiefs under the supervision of the Commissioner, Federated Shan States, through an assistant political officer, and there is the Namwan Assigned Tract, secured for administrative convenience, which likewise does not fall

(*l*) Government of Burma Act, 1935, s. 139.

(*m*) *Ib.* s. 154.

(*o*) *Ib.* s. 150.

(*p*) *Ib.* s. 144.

(*n*) *Ib.* s. 141.

(*q*) *Ib.* ss. 145, 146.

within British Burma, and for which legislation, if necessary, must fall under the Foreign Jurisdiction Act.

**Defence.**—Steps are in progress to secure the enlistment of Burmese and other races to take the place of Indians in the Burma forces in view of the separation from India. A Burma Frontier Force Act, 1937, had to be enacted by the Governor under s. 43 of the Government of Burma Act (7); it plans to provide a force to secure the tranquillity of the frontier districts; the British forces which are retained in the meantime secure the position.

**Burma and the Empire.**—Burma again differs from India in that it is not a member of the League of Nations, though there is no reason to suppose that in due course it may not obtain with the development of government such a status. Patently at present, it is too dependent on British control to comply with the requirement of self-government, which is necessary under the League Covenant for admission as a member. On the other hand, Burma has the great advantage over India of much greater homogeneity of the people, and thus presents the chance of the rapid development of true responsible government, unchecked by the division of authority and weakening of both planning power and responsibility, which are the inevitable defects of federation. Much will depend on the treatment of minorities, and on the decision of Burmans to co-operate in the Empire or to stand aloof. Burma is patently unable to defend her independence against any attack, save by aid of the British navy, and for the time being she has not even locally raised forces enough to maintain law and order in the case of serious unrest. The British connection is thus invaluable as affording the means of peaceful development unhampered by the crushing burden which otherwise would be imposed by reason of needs of defence. Burma has less than fifteen million people in an area as large as the Iberian peninsula, and without British protection would be a tempting prey. The admission of the head of the ministry as an observer, as in the case of Southern Rhodesia, to the Imperial Conference of 1937 may well presage fruitful co-operation.

It must, however, be noted that the racial rioting in Rangoon especially in 1938 showed a lack of firmness on the part of the ministry, and a disappointing failure on the part of the governor to take on himself the duty of suppressing the disorder which resulted in over 220 deaths, mainly of unarmed Indians massacred by Burmans. It is plain that, if international law were applicable between India and Burma, the former would have sound grounds for claiming heavy damages for the failure of the Burman Government to afford proper protection to its subjects. It seems clear that there are serious subversive movements on foot, and that Burmese politicians fall far behind those of India in competence for difficult tasks.

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